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HINDU LAW REFORM*

BY

SIR P. S. SIVASWAMI AIYAR, K.C.S.I., C.I.E.

I do not propose on this occasion to make any observations upon the subject of social reform. Though it is intimately connected with the subject of reform of Hindu Law, it is quite possible and practicable to draw a distinction between social institutions which have no legal force and legal institutions which have an obligatory operation upon the members of the community. Nor do I propose to go on this occasion into the details of any of the various measures for the reform of Hindu Law which are now before the public and are engaging the attention of both the authorities and the public. I think it more appropriate and practicable within the limits of time allowed to me to make a few general remarks upon the methods by which the reform of Hindu legal institutions may be carried out and to find out if there are any general principles which we should bear in mind.

The subject of Hindu Law does not cover all the legal relations between individuals in our society. It governs only certain limited relations. The three main subjects in regard to which we are governed by the Hindu Law are marriage, inheritance and the joint family system. It may be admitted that our Hindu system is not free from defects. But how are we to bring about reforms in these matters?

One method of reform is by means of judicial interpretation or indirect legislation. I have heard it said that my friend

*An Address delivered at the Gokhale Hall on Sir T. Sadasiva Aiyar's Commemoration Day.

Sir T. Sadasiva Aiyar was rather prone to rely upon this method of reforming Hindu Law. I have no particular objection to this method of indirect legislation. Where the process of reform is slow and attended with difficulty I am not one of those who would reject any available agency for bringing about a desirable reform. If it is possible to accomplish the desired object by means of judicial interpretation or indirect legislation, let us avail ourselves of it. But this method is not always applicable. Where the sources of law are texts which are open to the charge of ambiguity or obscurity, the judge is within his province in seeking to reconcile or interpret the texts and evolving some rule of decision which would be in accordance with the exigencies of the times. But it is not always that you find that there is a discordance between the texts or that they are open to the charge of ambiguity or obscurity. In those circumstances where the evil is clear but the door for interference is not open, it is not possible to rely upon the method of judicial interpretation, unless one is prepared to go to the length of distorting the texts, wrenching them out of their proper context and putting upon them a forced construction. But that process of distortion of our texts cannot altogether commend itself to a delicate conscience and I, for one, am not disposed to approve of a too ready resort to this indirect method of legislation where the matter is free from doubt and can only be remedied, if at all, by more straightforward and direct methods.

There is another method which has found favour with those who seek to reform our institutions by exploring and investigating the old texts. They seek to explain the present defects in the law by pointing out that they are departures from the wisdom of the ancients. They seek to show that if you only go back to the pristine purity of the old authorities you will be restoring the law not merely to a purer form but also to one more in accord with the needs of the present. That method proceeds upon the assumption that the ancient texts foresaw all the needs of the future and that they contained every possible provision for the requirements of the future age. This process requires very often a considerable exercise of imagination and is open to criticism on that account. But a more serious objection to this process is that those who place reliance upon it have too great a faith in the reasonableness of the people. They think that it has only to be shown to the people

that their present practices and usages are not in accordance with the old Vedic texts or with the 'smritis' and that they would at once revert to the ancient usages and abandon the present. I think it betrays a want of knowledge of the popular mind and its working. The cake of custom has grown so thick that it is not possible to break through it merely by resorting to the process of interpretation of the old texts and by successful criticism and research. Something more direct and some more open attack upon the present usages is required. When I am speaking of attack, I do not mean an attempt to carry anything against the wishes of the people or against public opinion. What I am thinking of is, rather, propaganda for the purpose of educating the public and converting them to your views by making them see the injustice and the anomaly and the defects of the existing institutions. That is the process which I should recommend.

Another method which of course is the most direct and straightforward is the method of direct legislation; and since the reform of our Legislative Councils there has been a plentiful crop of bills introduced in the various legislatures for the purpose of dealing with the defects in the Hindu law and in the Hindu social system. Whatever may be the motive which inspires those various bills, I welcome them all as evidence of an awakening to our defects and of a desire to remedy them as far as may be possible.

Is it possible to suggest any general principle in this regard as to the attitude which we should observe towards bills or legislative measures for the reform of Hindu institutions? There is one point which I may perhaps refer to, at the very outset. There are some who advocate a wholesale codification of the Hindu Law, a codification not merely of the rules of Hindu Law as they are at present, but a codification in the sense of amendment and codification. There are others who consider that the system of Hindu law is one entire structure and that it ought not to be impiously touched here and there but that the whole structure should be thoroughly examined and every part of it tested and that we should produce a perfect Hindu system. I am afraid that attempts of this sort are foredoomed to failure. In the first place it is an exceedingly ambitious attempt. It will take an enormous length of time. It will rouse very considerable agitation and opposition. There is no system of personal law in this world which can be said

to be perfect in all its parts and details. To my mind the surest and the most practicable way of dealing with these defects in our system is to make alterations as the necessity becomes felt, to alter a room here, to repair a room there and to go on carrying out alterations while we continue to occupy the house. The proper method is not to quit the house or leave it vacant or pull down the whole structure and seek to rebuild it with reference to *a priori* principles. "Sufficient unto the day is the evil thereof" is a maxim of very considerable worldly wisdom and I would follow that maxim in dealing with the demands of the reformers who wish to remedy the defects in our system of Hindu Law.

Passing on from this question of the desirability of a wholesale recasting of the Hindu Law or a piecemeal adjustment of the law, let us turn to another question. Supposing any measure is brought for the reform of some particular feature of the Hindu Law, and we feel convinced of the desirability of a change, should we seek to carry it out in the face of popular opposition. Is it right and is it possible to carry any measure in the face of popular opposition or popular sentiment? The second question whether it is possible can hardly arise if the legislature becomes fully responsible to the people and if there is a strong and active public opinion. In any country, where a system of responsible Government prevails, it would be unthinkable to attempt to carry any measure against public opinion, however wise the measure may be and however senseless the objections to it. We have only to look at the history of English social legislation. How many years did it take to pass the Deceased Wife's Sister's Bill? Suppose some legislator wants to introduce a bill in England for the cremation of corpses, what an amount of opposition would be aroused in spite of the fact that it is the most hygienic method of disposal and in spite of the fact that it prevails so largely in other countries? No Government would be able to last for a day which dared to defy public opinion in a matter of this kind. When the Indian legislature becomes fully responsible the question whether it is possible or practicable to carry anything in the face of popular sentiment or opposition would hardly be entertained.

The other question whether it is right may still be considered. There are many things which are not practicable but which nevertheless are perfectly right. The question is even

assuming that a certain measure of reform is opposed by the people, would it be right for you to use your power to carry it through? There are certain conditions of Government under which it may be possible and it has happened in India. For instance, the Government has passed Acts for the abolition of *Sati*, legalisation of widow marriages and the abolition of the disabilities of converts and they have introduced other measures like the Special Marriage (Amendment) Act in the interests of individual freedom for the purpose of protecting individuals and minorities from the oppression of the majority. There have been several cases of this sort and I think it was perfectly right on the part of Government to have passed those Acts. Cases of this kind can easily be imagined in the future also. With regard to all these cases, while I should very much like legislation in accordance with rational ideas of individual liberty and social progress, it would be impossible to carry out our ideas in opposition to popular sentiment. What then is the remedy available in cases of that sort? The only remedy which is open is to educate public opinion, to persuade the public to come round to your views and then go to the legislature with the support of popular opinion behind you. That is the only method which will be feasible hereafter.

I might give point to my remark by giving illustrations from recent legislative proposals, but I do not wish to enter into any discussion of the details of this measure or that, because to explain and justify any particular position I may take, with reference to any bill, must take much greater time than I should be justified in occupying. I would only say this. I would ask you not to go away with the impression that I am opposed to the reform of legal or social institutions or that I wish to shelve them to an indefinite future. I am merely pointing out what appears to me to be the right course of action. If, however, during the present transition stage, which may perhaps last for a considerable time, it is possible for us to carry anything in accordance with advanced and liberal ideas, even though it may differ from the views of the people at large, I should not hesitate to have recourse to legislation. But the question which a practical legislator has to consider is this : Is it likely to cause such a measure of discontent in the country as would make it dangerous or unsafe for a legislature or Government to embark upon it? The balance of advantage requires considerable discrimination and tact to judge and it is

not easy to lay down off-hand that the legislature ought to do this or that regardless of popular opposition.

I may here refer to Sir V. Bhashyam Iyengar's Bill in regard to the gains of Hindus by learning. This bill provided that the wealth acquired by education even if imparted at the cost of the joint family should not be liable to partition. The measure was an eminently sound one and the result of its rejection was that educated men who acquire wealth by learning seek methods of circumventing the claims of their coparceners as, for instance, by early partition. Though the bill was passed by the Madras Legislative Council, it was vetoed by the Governor in deference to popular agitation. This is an illustration of the duty of the authorities to judge on which side the balance of advantage lay. It was a difficult process but one which could not be helped. Under certain conditions, a Government may be justified in carrying through the legislature a measure endorsed by enlightened public opinion though it may run counter to the sentiments of an ignorant public.

What I wish to lay stress upon is that as conditions change, as the constitution approaches more and more to the responsible type and the legislature becomes more and more sensitive to public opinion, it would not be possible to carry things with a high hand and in defiance of public opinion. But let us also remember this—that because the opinion of certain sections of the public or even of the majority of the public may differ from your convictions it does not follow that you are absolved from the duty of speaking out your convictions and of trying to convert others to your views. Every man has a duty to his fellowmen and if his sense of citizenship is sufficiently keen and active, he should endeavour to convert others to the view which he considers right. But the vast majority of us take things too easily and are inclined to let things drift. If it is possible for us to carry things without opposition we like to do it, but if we meet with opposition we do often succumb and quietly accept our defeat. The right course for a citizen is not to be afraid of opposition, but to press his own views and seek to persuade others to adopt that course which he thinks best for the removal of those defects in our legal system which seem to require amendment.

SUMMARY OF ENGLISH CASES.

ENGELKE *v.* MUSMANN, (1928) A.C. 433.

International Law—Diplomatic privilege—Consular Secretary on the staff of German Embassy—Immunity from civil proceedings—Method of proving the status of the person claiming privilege—Statement by Attorney-General on instructions of Foreign Office—If conclusive.

In an action by the plaintiff for recovery of rent from the defendant in respect of a lease, the defendant, having entered a conditional appearance, applied to have the writ and all subsequent proceedings set aside on the ground that he was a Consular Secretary on the staff of German Embassy and, therefore, entitled to immunity from civil proceedings. In support of the application the defendant filed affidavits stating the nature of employment. Shearman, J., ordered the defendant to attend for cross-examination. In an appeal against this order, the Attorney-General under instructions from the Foreign Office informed the Court that the defendant was appointed a member of the staff of German Embassy. The Court of Appeal confirmed the order of Shearman, J.

Held (on appeal) that the information given by the Attorney-General as to the diplomatic status of a person claiming immunity from civil process was conclusive as to the fact of such status and the defendant was entitled to diplomatic privilege.

ESHUGBAYI ELEKO *v.* GOVERNMENT OF NIGERIA (OFFICER ADMINISTERING), (1928) A.C. 459.

Habeas Corpus—Successive applications of the writ to different Judges—Maintainability.

Although, by the Judicature Act of 1873, all the Courts have been combined in the one High Court of Justice, each Judge of that Court has jurisdiction to entertain an application for a writ of Habeas Corpus in term time or in vacation, and is bound to hear and determine such an application on its merits notwithstanding that some other Judge has already refused a similar application.

MANCHESTER CORPORATION *v.* AUDENSHAW URBAN DISTRICT COUNCIL AND DENTON URBAN DISTRICT COUNCIL, (1928) 1 Ch. 763.

Highway—Road constituted under a local Act—Increase in traffic—Deterioration of road—Repair—Liability.

The Manchester Corporation were by a local Act of 1875 authorised to construct a certain road in a particular manner and also to maintain it at their expense. The road was completed in 1878 and was for a considerable period maintained by the Corporation. About 1922, however, owing to very heavy traffic, the road had fallen into a state of disrepair and a controversy arose between the Corporation and the Local Boards as to the exact liability of the former to maintain the road.

Held, that the Corporation was only liable to maintain the road in the condition in which it was completed in 1878 and not in such a condition as to bear the ordinary traffic at the present day.

HOOD'S TRUSTEES *v.* SOUTHERN UNION GENERAL INSURANCE COMPANY OF AUSTRALASIA, LTD., (1928) 1 Ch. 793.

Bankruptcy—Chose in action—Insurance policy—Right of bankrupt to be indemnified by the Insurance Company—Benefit of, if vests in the trustees in Bankruptcy—Release by bankrupt of the claim—Effect.

By a policy of insurance, the insurance company undertook, in consideration of an annual premium, to indemnify *H* against any liability for compensation for accidental bodily injury, or for damage to property caused by any motor car driven by the accused. During the currency of the policy, *H* was involved in a motor accident whereby *C* was seriously injured by his car. *H* gave notice of the same to the company. *C* and the company could not agree as to the amount of damages and thereupon *C* sued *H* for damages. Subsequently *H* became insolvent and the Official Receiver was appointed trustee. Later on, *H* received a certain amount from the company and released his claim for indemnity. Subsequent to this, *C* obtained judgment in his suit against *H*. The trustee in bankruptcy sued the company on the indemnity.

Held, that the right of indemnity was a chose in action which vested in the trustee in bankruptcy and that neither the fact that *C*'s claim was not provable in bankruptcy nor the release by *H* would affect the right of the trustee to recover as against the defendant company.

In re ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED.

VISCOUNT BURNHAM *v.* ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED, (1928) 1 Ch. 836.

Limitation—Acknowledgment—Balance sheet of company referring to the amount due to debenture holders but addressed to shareholders—Civil Procedure Act (1833), *Ss.* 3 *and* 5.

An acknowledgment in order to be valid under section 5 of the Civil Procedure Act of 1833, need not be given to the claiming creditor.

Where the annual balance sheet of a company which was sent to the shareholders represented the aggregate amount of interest accrued and unpaid on all the issued debentures,

Held, that the publication of this balance sheet was a sufficient acknowledgment of the company's indebtedness to the debenture-holders, although the balance sheet was not sent to the debenture-holders.

M. WHEELER AND COMPANY, LIMITED *v.* WARREN, (1928) 1 Ch. 840.

Company—Receiver—Appointment of, by debenture-holder—Power conferred to act as agent and get in property—If implies power to sue in name of company.

A company which was formed for the purpose of building and selling houses issued a debenture. The debenture-holder appointed a receiver in exercise of the power reserved in the debenture deed. A receiver so appointed was expressly empowered by the deed to "be the agent of the company and to have power to take possession of and get in the property charged."

Held, that power to the receiver to sue in the Company's name without obtaining special leave to that effect was implied by the deed.

In re ETIC, LIMITED, (1928) 1 Ch. 861.

Company—Liquidation—Claim by liquidator against secretary in respect of sums overdrawn—Procedure—Companies Act (*Consolidation Act of* 1908), *S.* 215.

Section 215 of the Companies (Consolidation) Act of 1908 is not applicable to all cases in which the Company has a right of action against an officer of the Company, but is limited to cases where there has been something in the nature of a breach of

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duty by an officer of the Company. A claim by the liquidator against the secretary of the Company in respect of sums overdrawn by him on account of his salary and expenses does not fall under the section.

In re VISSER, H.M. THE QUEEN OF HOLLAND (MARRIED WOMAN) *v.* DRUKKER AND OTHERS, (1928) 1 Ch. 877.

International Law—Revenue laws of foreign State—Cognizance by British Courts—Suit to recover taxes payable under foreign law—Maintainability.

The English Courts do not take notice of the revenue laws of a foreign State and consequently a foreign State cannot sue in England for the recovery of taxes falling to be paid under the foreign law.

SMITH, *In re.* PUBLIC TRUSTEE *v.* ASPINALL, (1928) 1 Ch. 915.

Will—Trust—Direction to trustees to apply income to two persons—Mortgage by both the persons—Right of trustees to dispute.

Where the trustees under a will have a discretion to apply the whole or only a portion of a fund for the benefit of one person, but are obliged to apply the rest of the fund, so far as not applied for the benefit of the first named person, to or for the benefit of a second named person, the two persons together are the sole objects of the discretionary trust and are entitled, as between them, to have the whole fund applied to them or for their benefit. The trustees cannot dispute the right of the mortgagee to the income of the estate, where the mortgage is effected by both these persons.

JOHNS, *In re;* WORRELL AND ANOTHER *v.* JOHNS AND ANOTHER, 97 L.J. Ch. 346.

Bankruptcy—Mortgage—Stipulation for payment of greater amount to mortgagee in the event of the mortgagor's bankruptcy—Validity.

Where the scheme of a mortgage document is to secure that something more shall come to the mortgagee, if the mortgagor becomes bankrupt, than will come to him if he does not, the stipulation is void, being a direct device to circumvent the bankruptcy law; but the mortgagee will be entitled to hold his security for the moneys actually advanced and the security will be good to that extent.

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James Finlay and Company, Limited *v.* N. V. Kwik Hoo Tong Handel Maatschappij, (1928) 2 K.B. 604.

Sale of goods—C.I.F. contract—Bill of Lading stating date of shipment incorrectly—Right of buyer to damages—Measure of damages.

The seller under a C.I.F. contract is bound to procure and tender to the buyer a bill of lading correctly stating the date of shipment. Where the date of shipment is incorrectly stated in the bill of lading, the buyer is entitled to damages, the measure of which is the difference between the market price and the contract price of the goods where the latter is higher than the former.

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Morelli *v.* Fitch and Gibbons, (1928) 2 K.B. 636.

Sale of goods—Sale by description—Bottle of ginger wine—Bottle found defective—Right to damages—Sale of Goods Act (1893), *S.* 14 (2).

The plaintiff purchased a bottle of "Stone's Ginger Wine" at the licensed premises of the defendant and, while he tried to open the bottle by a corkscrew, the neck of the bottle came away from the bottle owing to some defect in it and the bottle fell to the ground and the plaintiff's left hand was cut.

Held (in an action for damages for the personal injuries caused) that the sale was one by description and, therefore, there was an implied condition that the bottle was of merchantable quality and the plaintiff was therefore entitled to damages for breach of this condition.

Benyon *v.* Thorpe, 97 L.J.K.B. 705.

Income-tax—Retired Managing Director of a Company—Voluntary annual allowance—Subsequent gift of lump sum in lieu thereof—Amount, if assessable—Income-tax Act (1918), *Sch. E.*

It was the custom of a company to give members of its staff a voluntary pension or allowance on retirement, but there was no contract to do so nor were there any contributions from either side to any superannuation fund. Allowances thus paid were taxed as the income of the company. A retired managing director of the company was paid a certain sum on retirement as voluntary pension but subsequently the company passed a resolution to pay him a lump sum as a personal gift to him in lieu thereof.

Held, that the amounts paid to him cannot be regarded as a supplementary salary for services as they were rendered, nor can they be said to be "profits or gains arising from an employment," but that they were, in reality, nothing more than gifts moved by remembrance of past services already sufficiently remunerated and therefore not assessable.

JOTTINGS AND CUTTINGS.

Appreciations of Lord Haldane.—Four interesting and fitting appreciations of Lord Haldane have been reprinted from *Public Administration* for October, and issued as a pamphlet by Mr. Humphrey Milford, of the Oxford University Press (1*s.*), under the title "Viscount Haldane of Cloan, O.M., The Man and His Work". They are "Lord Haldane," by Viscount Grey; "Lord Haldane at the War Office," by Sir Charles Harris; "Lord Haldane: His Influence on Higher Education and on Administration," by Sir H. Frank Heath; and "Lord Haldane as Lord Chancellor," by Sir Claud Schuster. We have been fortunate in this age to have had two pre-eminent statesmen whose interest was in philosophy as well as in politics. One is still living, and if he has lived in "Philosophic Doubt," he has always been clear and direct in affairs. Lord Haldane combined, perhaps, in an even higher degree profound thought with practical administration. "Haldane at the War Office," says Lord Grey, "was an example of Statesmanship in action". As for his philosophy, "he found it a real support in the trials and storms of life." On his work at the War Office, and of his interest in Education, we need not write here. The folly of the ignorant clamour that drove him into retirement at the beginning of the War has been fully recognised. Of his work during his two Chancellorships, Sir Claud Schuster knows more than any one else, and he gives an interesting account of his efforts to improve the organisation of the Lord Chancellor's Department, and to increase the efficiency and maintain the prestige of the Judicial Committee. As to the re-distribution of the Lord Chancellor's multifarious duties, his aim was a Ministry of Justice. That proposal met with strong opposition, and has not so far made any progress. Nor has his ideal of a single Court of Final Appeal. combining the House of Lords and the Judicial Committee. But his career was full of achievement, and of his personal characteristics of a Minister, Sir Claud Schuster says:

"He was an ideal chief. Always courteous, always considerate, he seemed to command affection, and in its enjoyment he expanded. But he knew his own mind, he pressed on to his own goal, indeflected by clamour, undepressed by solitude, unfaltering in the face of death."

—*L.J.*, 1928, p. 316.

Lord Parmoor, in the course of his reference to the death of Lord Haldane, said:—He passed from the War Office to the great office of Lord Chancellor, in succession to Lord Loreburn. Those who practised before him knew that not only did he possess a great knowledge of legal principles, but that he had the power to detach his mind so as to give an impartial consideration to the arguments addressed to him—a power which, in my experience at least, has only been possessed by our greater Judges. From the beginning of 1914 I was again brought into contact with Lord Haldane as a colleague in your Lordships' House, as a Lord of Appeal and a member of the Judicial Committee of the Privy Council. I think that his great work as a Judge was done in the Privy Council. There he turned his mind not only to the great constitutional questions which came before him, but to a better organisation of our whole judicial system. He had not time to complete his work in this direction, but his influence is still seen in the proposal contained in His Majesty's gracious Speech where we are invited to pass a Bill authorising the appointment of two additional members of the Judicial Committee of the Privy Council and one additional Lord of Appeal in Ordinary.

And the Marquis of Salisbury: I have said he was a friend, and so he was—a personal friend ; but from a Parliamentary point of view he possessed that great spirit of comradeship which enabled him, quite independently of any Party consideration, to help any man, or any body of men who were responsible for affairs, in seeing that the business of the country was properly carried through. Personally, I can speak with great knowledge, for I received the utmost consideration at his hands. In many departments of public life he was altogether free from any Party feeling. He was a great Party man, of course, but, beyond his Party feelings, there was a large area of public life which he looked upon from an entirely impartial standpoint, and in which he was of the greatest assistance to any Government, whatever its political complexion. These were very great qualities, and I am sure all of us on this side of your Lordships' House will miss him from the Benches opposite.—*L.J.*, 1928, p. 327.

At the Hardwicke Society Annual Dinner the Marquess of Reading, G.C.B., G.C.V.O., in the course of his speech on the toast of the guests submitted the toast of "The Guests." He said it gave the Benchers of the Middle Temple great pleasure in having the society as their guests at the room in which they held their meetings. The Society was a great society. One had only to look at the names of the men who had passed through it to be convinced of that. Many of them had attained to the higher offices. He had always considered the Society a very real thing. It taught its members to think standing on their legs. Very often a speech was valueless because thought was obscured. It taught the whole value of discussion and of replying to the arguments of an adversary, and this was invaluable to the young members of the Bar. There was no profession which offered so many inducements, so many glittering prizes to those who were successful, there was no profession in which jealousy played so small a part, none in which the members were more ready to recognise merit. But it needed that its members should work hard. He was reminded of what that great veteran who had recently died once said to him : "Now, young man, young Rufus," as he called him, "when you are called to the Bar, don't look upon yourself as a man who is his own master who can come when he likes and go when he likes, but rather regard yourself as a clerk, who has to be at his place at a particular time in the morning and must not leave until a particular time at night. And if you only follow that advice I have no doubt as to what the future will have in store for you." He believed that to be the best advice to give to a young man, and he gave it to his friends, and he gave it to all members of the Society. He wished to impress upon the younger men present that they should concentrate upon their work, that they should give constant attention to it. This would be a very great asset for the future. The young man was apt to be carried away by his enthusiasm, his thoughts taking him into the romantic regions of the Profession, and he already saw himself as a learned occupant of the Bench; but in the end he would have achieved something, and he (the speaker) believed that in order to achieve that something there was no better profession than that of the Bar. If they could not all become Judges of the High Court, or even of the County Court, there was the world before them, and he would say to the young men at the Bar, "Go forward, don't be discouraged, make up your mind that you will succeed But in order to do that never fail to concentrate on that purpose, and then you will be certain of some success."—*L.J.*, 1928, p. 329.

Irish Language in Free State Courts.—The Times Correspondent at Dublin in a message of November 7 says:—"In Dail Eireann to-night the Bill compelling future barristers and solicitors in the Free State to have a knowledge of the Irish language passed its second reading by 110 votes to 15."—*L.J.*, 1928, p. 330.

Ex-Lord Chancellors' Pensions—It has been generally supposed that an ex-Lord Chancellor is available, so far as age and health permit, for appeal work. An ex-Lord Chancellor is entitled to a pension of 5,000*l.* a year. How far these matters are related, and whether the pension can be properly regarded as a *quid pro quo* for the judicial service, is the subject of an interesting controversy contained in observations by Sir Henry Slesser in the House of Commons on Tuesday, in a statement by the Attorney-General that Lord Birkenhead will draw his pension "during the period of transition from his old duties to his new duties," and a lengthy reply to Sir Henry by Lord Birkenhead in a letter to *The Times* of Thursday. The letter shows that Lord Birkenhead's style has lost none of the force which characterised his utterances during his early and rapid rise to forensic and political fame. But remembering that he stood sponsor in Parliament for those provisions of the Law of Property Act which were designed to bridge the gap between the Old and the New Conveyancing, "transitional" seems as blessed a word to him as "Mesopotamia" has been supposed to be in another connection. And why, with all those glittering prizes in the "City" which the Press has said are already in Lord Birkenhead's grasp, should there be this reluctance to part with the final instalment of the "bird in the hand"? That is a question we have no intention of answering, but we are not surprised that the passage from the Woolsack to the City—the opposite, as Lord Hailsham has said, of his own passage from the City to the Woolsack—raises a little dust. We may add that Sir Henry Slesser's observations, as reported in *Hansard*, do not appear to bear quite the interpretation which Lord Birkenhead, quoting from *The Times* report, gives them.—*L.J.*, 1928, p. 335.

Etiquette of the Bar.—It is but seldom that, at the close of a plaintiff's evidence, his counsel finds it necessary to withdraw from the case and submit to judgment by reason of matters which have appeared during cross-examination. And it is

certainly remarkable that such a result should have occurred in an action,—*Hopkins* v. *Scott* (*Times,* November 16 and 17),—in which a member of the Bar sued a solicitor for an alleged libel accusing the barrister of unprofessional conduct. The suggestion was that the plaintiff had appeared in various Courts in cases in which he had not been instructed by a solicitor, and that he had engaged in conveyancing work on behalf of lay clients without the intervention of a solicitor. The latter charge does not seem to have been gone into, and, indeed, there is some doubt as to how far now-a-days counsel is entitled to prepare conveyancing documents for reward without being instructed by a solicitor. Unless it can be said that the ancient rule has been abrogated in some way, it would seem that he is so entitled; though considerations of practical convenience result in its being so rarely taken advantage of that many members of the Bar are quite ignorant of it. But the admissions of the plaintiff as to the methods by which he obtained instructions to appear in various cases on behalf of clients who never saw or communicated with the solicitor who purported to instruct him, made it plain that the allegations of unprofessional conduct made by the defendant to the secretary of the Law Society were so far justified that the action must fail.—*L.J.,* 1928, p. 337.

Arranging the Lists.—During the present Sittings two Judges at least have been moved to comment on the perennial difficulties which occur in arranging the day to day business of the Courts. On an application being made for a case to stand out of the list on the ground that the parties were not ready, Mr. Justice Rowlatt observed with much justice that the practice of asking for the postponement of cases shortly—often immediately—before they are due to come into the paper for hearing not only makes the arrangement of the daily lists very difficult, but leads directly to further applications for cases to stand out from parties who find their actions are likely to come on for trial much earlier than they had reason to expect. This is a matter which should be capable of remedy; as the work becomes more up-to-date, practitioners will have to take more care to see that they do not set down cases for hearing until they are practically ready for trial. The other point was raised by the Lord Chief Justice, who recently complained of the frequent inaccuracy of estimates given to the Court as to the length of time which a trial will take. Lord Hewart's

threat that he would visit an inaccurate estimate with a penalty in costs is the subject of a light-hearted comment in another column. Whilst it is, of course, impossible to estimate with complete precision the length of time which a case will take in trial, an approximate estimate can nearly always be made; the experience of the past twelve months of the new system in the Chancery Division, under which witness actions are divided into those likely to take more than two days or less than that time, shows that. It is but very rarely that a case in the list of shorter cases occupies more than two days; and it is rarer still that a case in the other list, unless, of course, it is settled, takes less than that time in trial.—*L.J.*, 1928, p. 337.

"*Waiting at the Bar.*"—"Women," says the headline of one of those chatty little articles on the position of women lawyers, which constantly appear in the lay press, "Women wait at the Bar in vain," and the article itself takes the form of an interview with a woman barrister who suggests that "prejudice" is preventing the ladies now at the Bar from being as successful in that profession as they would wish. This prejudice, which is alleged even against the women solicitors, is, of course, entirely imaginary. It is, no doubt, difficult for the barrister, of whichever sex, who has not long been called, and who is conscious of his or her ability, to realise that the solicitor who has to select counsel to represent a client cannot, except in rare instances, instruct a member of the Bar of whom he knows little or nothing. He is bound, in his client's interest, to choose someone of whose capacity he has some knowledge, either direct or indirect. This is, of course, the reason why, except in special cases which are such obvious exceptions that they establish the rule, no one who is called to the Bar can expect to make a living by practice for several years; and failure to attain an established position by any member of the Bar is no evidence either of want of ability on his or her part, or of prejudice on the part of solicitors or the public. As a matter of fact, the ladies who have appeared in Court during the last few years have had a very considerable advantage over their contemporaries of the other sex; for they have received a great amount of publicity from the lay press; and publicity is what the beginner at the Bar most needs.—*L.J.*, 1928, p. 337.

The end of the Gallows.—Apparently the death penalty for murder is gradually dying in Europe. Austria, Belgium,

Holland, Finland, Denmark, Norway, Sweden, Italy, Roumania, Portugal and Lithuania are countries where, by express abrogation or by desuetude, executions are no more. There is an impression abroad in the country, an impression for which such mild authorities as Lord Darling and Lord Birkenhead are in part responsible, that dire results would follow the abolition of the gallows. I must confess that I was not free from an apprehension that following such a change the many who suffer from an inhibited desire to murder their undesirable relatives would have a riotous feast of terrible fulfilment; or to put it mildly, that the number of homicides would increase. After reading some statistics on the subject, and particularly after a careful study of Lord Birkenhead's article in "Britannia," I begin to entertain serious doubts. Italy, for example, is a country inhabited mainly by people of Latin race, and quick to strike in moments of anger. Yet I am credibly informed that between the abolition of capital punishment in 1889 and the year 1920 the number of homicides declined steadily and remarkably. 9·23 per 100,000 of the population in 1889—that was the homicidal rate. In 1920 it was 3·48, at the end of a steady and persistent decline. And so with others.—*L.J.*, 1928, p. 348.

A Lord Chancellor's Pension.—The dust, as we described it last week, of Lord Birkenhead's passage from Westminster to the City has, perhaps, been temporarily alayed, but not without some further commotion caused by his resentment of legitimate criticism, and his "incredibly inept"—to use his own words with regard to the Attorney-General—reply to the intervention of Mr. Grant, K.C. Lord Birkenhead's short letter in *The Times* of November 24, associating Mr. Grant with Sir Henry Slesser—who has maintained a dignified silence—in the future legal appointments of the Labour Party, had, of course, no foundation in fact, and was unworthy of a controversy which, after all, does raise an important question of principle, namely, how far an ex-Lord Chancellor's "pension" is, by unwritten practice, dependent on the performance of the judicial duties suitable to his position. Why Sir Thomas Inskip's reply was inept is not apparent. It was made in the debate on the Appellate Jurisdiction Bill on November 23 (*Hansard*, p. 2134).—*L.J.*, 1928, p. 356.

Law and Practice.—Mr. Grant has referred to a statement of the practice by the late Lord Haldane: "It is a popular superstition that because the payment to an ex-Lord Chancellor is called a pension it is money which is not earned by continuous hard work. This is an error. The ex-Lord Chancellors sit just as regularly and do as much work as the six salaried Law Lords. . . . They are bound constitutionally and morally to discharge these judicial duties, although for historical reasons the payment to them has been called a pension." This originally occurred in an article by Lord Haldane on "The Judicial Committee of the Privy Council" in the *Empire Review* for July, 1927. Mr. Grant quotes it from "The Selected Addresses and Essays," 1928, p. 229. Lord Birkenhead rejects it as being unsound in practice, and Sir Malcolm Macnaghten, referring to the Judicature Act, 1925, section 13, and the Lord Chancellor's Pension Act, 1832, (2 and 3 Will. IV., c. 111), rejects it as being unsound in law. On the legal point that may be so, though Sir Malcolm does not seem to state the Act quite correctly. Letters Patent may be issued granting the pension, and they may impose a condition of suspension on return to the Woolsack or the holding of any other office of profit. The pension is not, as Sir Malcolm says, necessarily suspended. What is the usual form of the Letters Patent we do not know; probably the effect is to suspend the pension. The Pension Act, oddly enough, recites that it was a recompense for the Lord Chancellor's loss of patronage when superfluous offices in the Court of Chancery were abolished. The inference is that he made pecuniary advantage of this patronage, which brings him near to Lord Bacon's lamentable case. However that may be, the Act shows the legal basis for the pension. As to the constitutional practice, we prefer Lord Haldane's authority in this matter to Lord Birkenhead's, and, as we have already intimated, the great Chancellors of the recent past—Lord Cairns and Lord Selborne—would have regarded the present controversy with—shall we say—pained surprise.—*L.J.*, 1928, p. 356.

Origin of the Ex-Chancellor's Five Thousand.—One fact clearly emerges from the current tumult concerning the ex-Chancellor's pension—Lord Birkenhead can defend himself; and his letter in *The Times* of November 27 is of its kind a masterpiece. After complying with the request of Grant, K.C., and delivering an "opinion" not wholly free from legal blemish, he thus proceeds: "The characteristically foolish speech of

Mr. Benn in the House of Commons, and the incredibly inept reply by the Attorney-General, have given me greatly to doubt whether I must not trust to myself alone, and not to the head of the Bar, to expound and enforce a position which he, of all others, ought to have understood, but in relation to which he has made so feeble and pompous a reaction."

It is a strange and curious thing that apparently neither he, nor the A.-G., nor any of the other principals took the trouble to refer to 2 and 3 Wm. IV, c. III, and to observe the impregnable quality of Lord Birkenhead's position, until Sir Malcolm Macnaghten, whose letter, like a happy supplement, appears under that of Lord Birkenhead, drew attention to the pension's legal history. He shows not only that the ex-Chancellor has a legal right to it, but that it was acquired in exchange for a very valuable consideration.—*L.J.*, 1928, p. 369.

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2 and 3 Wm. IV, c. III.—By that Act a number of offices, all in the Lord Chancellor's gift and patronage, utterly ceased and determined, and "Whereas by reason of the Abolition of the said Offices the Lord High Chancellor or Lord Keeper of the Great Seal for the time being would be deprived of the Patronage and Gift of the said Offices, which does of Right belong to and has been exercised by him ; and it is therefore just and equitable that more ample Provision should be made for the Lord High Chancellor or Lord Keeper of the Great Seal on his retirement from Office," that Act authorises His Majesty by Letters Patent to give and grant to the retiring Chancellor or Keeper an Annuity or Yearly Sum of Money not exceeding Five Thousand Pounds for and during the natural Life of the Person so retiring. For the purposes of the present discussion, Lord Birkenhead is obviously that Person.

But the main point of the "characteristically foolish speech of Mr Benn" remains unanswered, namely, whether it was desirable that a Judge of the highest Court, judging *inter alia* commercial causes, move to and fro, without prejudice or harm, between the judge's seat and the directors' armchair. But that is an entirely different question from that of the pension.—*L.J.*, 1928, p. 369.

Insisting on a Right.—It is a question which has not yet arisen and may in fact never do so ; for Lord Birkenhead, who

has not discharged judicial functions since 1924, "went into the City" from the India Office, and may never again return to the Privy Council or take any part in House of Lords' Appeals, commercial or other.

I cannot help thinking that his declared object in retaining the pension "for a few weeks," namely, to assert and insist upon the rights of his successors, is partially defeated by this declared intention of his wholly to transfer the pension to trustees for charitable uses. A successor who may be in grater financial need than Lord Birkenhead may be greatly embarrassed by this precedent. A sensitive ex-Lord Chancellor (if such there be) may feel that he is a robbing the hospitals by insisting on his rights. I wish Lord Birkenhead had not taken this foolish, generous course ; or that he would bestow the money in aid of a more transient cause.—*L J.*, 1928., p. 369.

Family Provision for the Lord Chancellor.—What were the offices the gift and patronage whereof were shorn from the Lord Chancellor by that Act of 1832, and what was their value?

These were the offices : Keeper or Clerk of His Majesty's Hanaper (Hamper or Picnic Basket), the Patentee of the Subpœna Office, the Registrar of Affidavits, the Clerk of the Crown in chancery, the Clerk of the Patents, the Clerk of the Custodies of Lunatics and Idiots, the Prothonotary of the Court of Chancery, the Chaff Wax, the Sealer, the Clerk of the Presentations, the Clerk of Enrolments in Bankruptcy, the Clerk of Dispensations and Faculties, and the Patentee for the Execution of the Laws and Statutes concerning Bankrupts.

The total annual emoluments of which offices, whereby the L.C. was enabled to make provision for his family, amounted to nearly £25,000 ; and it is perhaps interesting to note that the Waxchafer or Chaff Wax received for his slight services 1,300*l.* a year; and his deputy 400*l.*—*L.J.*, 1928, p. 369.

The Civil Judicial Statistics.—The Civil Judicial Statistics for the year 1927, which have just been published (Cmd. 3174, 1*s.* net) show a decline of business in the Courts of Appeal and in each Division of the High Court—except in Divorce—but a very substantial increase of 16 per cent. in the number of cases commenced in the County Courts, as compared with 1926.

Fluctuations in the number of appeals may be due to a variety of causes, and from the point of view of the litigant, a decline is not to be deplored. The decline of business in the High Court is not very great—4·9 per cent. in the Chancery Division, 2·9 per cent. in the King's Bench, whilst the increase of 12·6 per cent. in the Probate, Divorce and Admiralty Division makes the total percentage reduction for the High Court 2·3 per cent. 1927 was the first year in which the Judicial Proceedings (Regulation of Reports) Act of 1926 was in operation, and the increase in the Divorce figures—from 3,782 to 4,444—will, no doubt, be attributed in some quarters to the effect of the Act. As we have several times pointed out, there are three other factors which tend to cause an increase in the number of petitions for divorce—the Matrimonial Causes Act of 1923, which enables a wife to petition on the ground of simple adultery, the new Poor Persons system, which was in full working order for the first complete year in 1927, and the extended power to try Divorce cases at Assizes. We observe that the officials responsible for the preparation of the Judicial Statistics share our view that these causes are responsible for the continued increase of Divorce business, and the more prefacing the Tables of figures says explicitly that there is little ground for the view that the Act of 1926 has as yet resulted in any large addition to the number of Divorce cases. As a matter of fact, two-thirds of the increase in Divorce cases in 1927 were Poor Persons' cases, which are hardly likely to be affected by the suppression of detailed reports.—*L.J.*, 1928, p. 380.

The Working of the Adoption Act.—One of the most interesting sections of the Report deals with the adoption of children under the Act of 1926, and gives, we believe, the first available information as to the working of that Act. The most remarkable point which emerges is that the vast majority of these applications are made to the Juvenile Court; for the first fifteen months during which the Act was in force—from January 1, 1927, to March 31, 1928—there were 234 applications to the High Court, 311 to the County Court, and 3,841 to the Juvenile Court. So that the applications to the Juvenile Court exceed by more than seven times the number made to the High Court and the County Court together. It is of interest to note that about two-thirds of the children adopted are illegitimate, and that in a number of cases such children are adopted by their own parents. The vast majority of children adopted are, natu-

rally enough, under age of fourteen years at the time of adoption; this proportion is, we imagine, likely to increase, as there must have been a good many cases in the period under consideration in which *de facto* adoptions, some of which have been in existence for several years, have been legalised. One point is mentioned which will, no doubt soon come up for judicial decision by a Divisional Court; indeed, it is a little remarkable that this has not already happened. Several Courts, says the Report, have decided that an adoption order does not have the effect of terminating an affiliation order, and when consulted on the point, the Home Office has given similar advice. Having regard to the language of section 5 (1) of the Act—which appears to be the relevant provision—we are a little surprised at this—

5. (1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents . . . . of the adopted child, in relation to the future . . . . maintenance . . . . . . of the adopted child . . . . shall be extinguished and all such rights . . . . and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock. . . .

The point is, at any rate, doubtful, and the sooner a decision on the point is obtained and reported, the better.—*L.J.*, 1928, p. 380.

Defined at Last: First, Second and Third Degree.—"The third degree, whatever that means," is an expression to which Hyde Park matters and their Parliamentary sequel have accustomed us. Vaguely we have felt that it was a dastardly attempt to reintroduce the torture, the "question," the verbal rack applied to the mind of a frightened person for the extraction of such truth as for the time being might be required by the police.

Now, at last, we know. The trans-Atlantic term has too long been at large amongst us; and to the tireless industry of Lord Lee of Fareham, ostensibly, we owe this overdue meeting of the term and definition, and a happy escape from this terror of the undefined. From Wigmore, of the U.S.A., on evidence, he quoted in this wise:

"In criminal law and practice the officer of the law administers the first degree when he makes the arrest. When the

person is taken to a place of confinement that is the second degree. When the person is taken to private quarters and there interrogated as to his comings and goings, that is called the third degree." So now as hereinbefore declared, we know.—*L.J.*, 1928, p. 392.

BOOK REVIEWS.

TOWARDS SWARAJ, by S. K. Sarma. Published by M. K. Srinivasa Aiyangar, Triplicane. Price Rs. 5.

The times we are living in mark a transitional period in the constitutional advance towards Self-Government for India. In the intensity of our aspirations we are liable to forget some of the basic principles regarding the best form of Government founded on democratic ideals and answering the peculiar circumstances of a country like India with its unwieldy millions of diverse races and different tongues. Books on the constitutional problems of India dealing with the chief obstacles to the smooth working out of a scheme of Responsible Government may not be unwelcome to many who are yet untutored in political thought and unfamiliar with the real disadvantages that beset our path. Hence our due thanks to Mr. Sarma for his new book entitled "Towards Swaraj."

This book touches upon all the various topics which would generally invite the careful attention of a student of Indian politics. But still we hesitate to think, it will secure a favourable opinion from him, considering the incompleteness of many a subject that has been discussed here. The opening pages contain a good survey of the period of Reforms and after, with an inevitable demand for further more. A clever comparison of our political development in recent years with that of some of the other countries who have worked out their own evolution while equally bad conditions prevailed, brings home to us, how we are not too early in our demand for Freedom. The diatribe against the party system only shows the one side of the picture, leaving room for us to doubt the maturity of the author's political thought. For no student of Modern Democracy can say without demur that a Responsible Government will be an easy success without political parties. On the other hand, it should have been pointed out, that the evil arises only out of the existence

of numerous parties instead of two. Sober opinion and maturer wisdom would persuade us to the belief that an increasing collective responsibility of the Cabinet will certainly, one day, tend to the reduction of parties. The question of the preponderance of the Central Government over those of the provincial has been discussed here half-heartedly. A type of Government, as in Canada with a Central Legislature as a repository of residuary powers or as in the latest German constitution, with a central legislature having a normative jurisdiction over the provincial legislative bodies, may be a God-send to us. But we have to pause here in order to express our surprise at the conspicuous absence of a timely discussion of the recommendations of the Nehru Report. We cannot resist remembering the significance of the words of one of our own writers who characteristically criticised the obsession by the Central Government thus, "the head-gear, if a grace and a necessity, has now become a load, which fatigues the pilgrim on his way to the hill-god." The function of the Central Government, in a scheme of a Responsible Government, with certain powers exercisable on rare occasions, as enumerated by Sir P. S. Sivaswami Aiyar in his recent book "The Indian Constitutional Problems" appeals to us to be necessary for our own safety. The proposal for an itinerant batch of the Judicial Committee of the Privy Council to be visiting India is unconvincing in view of the enormous drain that may be caused by it on the finances of the State. It is not too prematurely expressed when the author points out how the Secretary of State's Council has outlived its usefulness.

However much we may be in sympathy with the patriotic feelings of the author when he deals with the questions of Indian Defence and Native States, we are only inclined to judge them as lacking sufficient materials, especially, when our minds are fresh with information from the chapters bearing the same headings in the book of Sir P. S. Sivaswami Aiyar. The chapters on Franchise and Administrative Services have not been rendered quite alluring.

That this volume should have followed in quick succession the book on "The Indian Constitutional Problems" which deals with almost the same subjects is perhaps its chief handicap. Yet we conclude, that certain portions of this book containing pungent and often wholesome remarks against the existing order offer us lively reading.—K.C.

THE INDIAN CONSTITUTION, by Mr. M. C. Chagla. Bombay Book Depot, Girgaun, Bombay. Price Rs. 3.

This tiny volume is a successful attempt to present the student world with a neat and analytical exposition of the chief provisions of the Government of India Act of 1919. It is much helpful to have given in such a concise form the history of each part of the constitutional machinery with a criticism of its working. On the whole the idea underlying the publication is praiseworthy, though we cannot for a moment agree to any such notion, that a thorough grasp of the constitution of India can be gained by going through these pages. The book strikes us as more an aid to pupils studying for a question paper on the Government of India Act than as a treatise for the enlightenment of the general public upon the present constitution.

Anyhow we appreciate the author for his fair contribution to the increase of a correct knowledge of the Indian Constitution.—K.C.

THE LAW RELATING TO ACCOUNTS IN BRITISH INDIA, by N. Kasturiranga Aiyangar, B.A., B.L., Advocate. Published by Globe Publishing Co., Madras. Price Rs. 2.

The object of this small book is in the author's own words, firstly to equip the profession with a handy treatise enunciating and illustrating the various principles governing the subject of accounts, together with the up-to-date case-law thereon and secondly to place the legal profession on the track of commercial techniques and modern methods of accounting in commercial circles. The author has also dealt with the articles of the Limitation Act relating to acknowledgments, part-payments, accounts stated, and mutual open and current accounts and the case-law on them. He has besides incorporated the law relating to appropriation of payments in the Indian Contract Act and the provisions of the Indian Evidence Act relating to account books and their evidentiary value. Going through some of the pages of the book, we find it stated, on page 83, that a payment of interest by one of the heirs of a deceased debtor will not save limitation as against the other heirs and *Arjun Ram Pal* v. *Rohinia Banu*[1] and *Yagappa Chetty* v. *K. Y. Mahomed*[2] are referred to in support of the proposition.

1. (1912) 14 I.C. 128. 2. (1917) 40 I.C. 858.

We must point out that the question is by no means free from doubt, and the decision in *Arjun Ram Pal* v. *Rohima Banu*[1] is in conflict with the observations in *Sarada Charan* v. *Durgaram De Sinha*[3] and has not been followed in *Ibrahim* v. *Jagdish Prasad*[4] which reviews all the cases and in which the contrary view has been laid down. Since the publication of the book under review the Madras High Court has followed the Allahabad case and dissented from *Arjun Ram Pal* v. *Rohima Banu*.[1] The glossary of mercantile terms and the appendix relating to accounting in commercial circles will, we are sure, be found useful. The utility of the book would have been considerably enhanced if the technical expressions used by the Nattukottai Chetties in their accounts and their mode of dealings which frequently come before the Courts had also been considered.

COURT FEES AND SUITS VALUATION ACTS, by Jhanabi Charan Bhaumick, B.L., 3rd Edition, 1929. Published by Messrs. M. C. Sarkar & Sons, Calcutta. Price Rs. 4-8-0.

This is a commentary on the Indian Court-Fees Act of 1870 as amended by the various local Legislatures and of the Suits Valuation Act giving the circular orders, rules and notifications by the Local Governments and by the High Courts of Calcutta, Bombay, Madras, Patna, Allahabad and Rangoon. The learned author has brought the cases up-to-date. We however miss the reference to *Subramania Aiyar* v. *V. Rama Aiyar*[5] where the learned Judges have noticed the anomaly, of a suitor, having to pay a higher Court-fee, under Sec. 7 (5) (*d*) of the Court Fees Act, when he sues for the possession of a part of an estate than if he has to sue for the entire estate under clauses (*a*) and (*b*) of the same sub-section. The learned Judges have held that this anomaly has been rectified by a notification of the Government of India referred to by them. If the construction of the notification adopted by the learned Judges is right, many decisions referred to by the learned author, at pages 67 and 68 of his book, might require reconsideration. We hope the book will be found useful by practitioners and judges.

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1. (1912) 14 I. C. 128
3. (1910) I. L. R. 37 Cal. 461.
4. A.I.R. 1927 All. 209.
5. (1927) 54 M.L.J. 67.

POLICE REPORTS AND INVESTIGATION, by Khan Sahib M. K. A. Khan, Advocate, Lahore. Price Rs. 4.

This is the third publication of Mr. Khan's Civil and Criminal Law Series. The author has dealt in this volume with the law and practice relating to Police Reports and Investigation having reference to the relevant provisions of the enactments. The decided cases are noticed in their places. The debates in the Legislative Assembly and the Police Rules and Regulations are also given and they will be found useful.

ACCOMPLICE AND APPROVER, by Khan Sahib M. K. A. Khan, Advocate, Lahore. Price Rs. 4.

This is the fourth publication of Mr. Khan's Civil and Criminal Law Series. The author has in this book dealt with the law relating to accomplices and approvers with reference to the relevant provisions of statutes relating to the same and bringing the case-law up-to-date. There is also a special treatment of the law relating to bribery in the course of the author's treatment of the subject.

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CRITICAL NOTE.

RAMGOPAL *v.* DHANJI JADHAVJI BHATIA, (1928) L.R. 55 I.A. 299: I.L.R. 55 C. 1048: 55 M.L.J. 248 (P.C.).

The decision of the Privy Council in this case deals with an important point in the law of damages arising out of an *anticipatory* breach of contract, namely, how and in what manner the plaintiff ought to have mitigated the damages. The position is summarised in the concluding passage thus: "The contract was repudiated almost as soon as it was made, and, the intended operation being thus baulked, the plaintiff was entitled to measure his damages as they then stood and could not be required by the defendants to buy the cotton, which they had announced in advance they would not gin for him." It is difficult to understand what was meant by the words "as they then stood". Could it have been intended thereby to depart from the well-established rule that even in cases of anticipatory breach the damages ought to be assessed with reference to the date of performance though the plaintiff might bring his suit immediately after the breach? The position that the plaintiff need not have purchased cotton will be perfectly intelligible if other means of having the cotton ginned were unavailable. But it appears from the judgment that there were other mills in which the cotton could have been ginned on payment of an extra cost. Under those circumstances the question reduces itself to whether the plaintiff was bound to enter into a fresh contract with some other ginning mill after the breach and before the date of performance. If he must, then it follows that he should have had the cotton ready. Supposing in the case under discussion instead of the defendant having been in breach the plaintiff was, can the mill-owner recover the entire ginning

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charges by way of damages without attempting to get other cotton for being ginned?

In England the preponderance of authority seems to be in favour of the view that "if the plaintiff acts unreasonably in not making a new contract before the time of performance, which will secure substituted performance at lower cost than would be required when performance is due, his damages will be based on such lower cost.*" This rule which seems to have had its origin in an observation of Cockburn, C. J., in *Frost* v. *Knight*[1] has been largely invoked in cases of contracts for the sale of goods. No doubt Kelly, C.B., took the view in *Brown* v. *Muller*[2] that the plaintiff could not be called upon to enter into a fresh contract, but Bramwell, B., who had left the Court before judgment was pronounced seems to have thought otherwise and in *Roper* v. *Johnson*[3] the latter view found favour. It may be mentioned incidentally that Mr. Mayne's view as to the effect of *Roper* v. *Johnson*† is open to question. Far from following *Brown* v. *Muller* the learned Judges sought to explain it away on the ground that it simply negatived the plea that the *onus* rested on the plaintiff in such cases to prove his inability to enter into a fresh contract. It was clearly indicated that the result would have been different in the case before them if the defendants had adduced evidence to the effect that "the plaintiffs could without extraordinary trouble have entered into another contract".

In *Roth & Co., Ltd.* v. *Taysen, Townsend & Co.*,[4] a seller's action to recover damages, the Court of Appeal held affirming a judgment of Mathew, J., that the plaintiff's failure to sell the cargo at a favourable time was unbusinesslike conduct and the same was made the ground of estimating the damages on a diminished scale. It cannot seriously be contended that it makes any difference in principle whether the action is at the instance of the seller or the buyer *Paysu Ltd.* v. *Saunders*[5] was a buyer's action and it was held that the plaintiff was bound to accept a substituted contract on modified terms offered by the seller in default. It may per-

*Mayne on Damages, 10th Ed., p 123

1 (1872) L R. 7 Ex. 111 at 113. 2. (1872) L.R. 7 Ex. 319 at 322.

3. (1873) L.R 8 C P 167.

†*See* Mayne on Damages, 10th Ed., p 164.

4. (1896) 12 T L R 211: 1 Com Cas. 206 *See also* Judgment of Mathew, J., in 12 T.L R. 100

5 (1919) 2 K.B. 581 (C.A.)

haps be said that it is one thing to hold that the plaintiff ought to accept an available contract, another thing altogether to claim that he should *endeavour* to obtain a new one. But two subsequent decisions seem to have gone the length of saying that the latter course must be pursued if circumstances permit. In *Melachrino* v. *Nickoll*[6] the decision turned on the question whether the time for the performance of the contract was 'fixed' within the meaning of the Sale of Goods Act. But the judgment of Bailhache, J., contains a lucid exposition of the rule as to mitigation of damages in cases of anticipatory breach. He says: "It is the duty of the buyer to go into the market and buy against the defaulting seller if a reasonable opportunity offers. This is expressed by the phrase 'it is the buyer's duty to mitigate the damages'. In that event the damages are assessed with reference to the market price on the date of the re-purchase. If the buyer does not perform his duty in this respect the seller is none the less entitled to have the damages assessed as at the date when a fresh contract might and ought to have been made." The later case of *Millet* v. *Van Heek & Co.*[7] is perhaps more authoritative not only because it was a pronouncement of the Court of Appeal but also because the question there arose directly. It was held that the difference between the contract price and the market price was only a *prima facie* rule. Where the reasonable course to be pursued would be for the buyer to enter into a forward contract on the date of the breach or at some later date the damages should be assessed according to the difference between the price in that forward delivery and the contract price. The test seems to be whether the plaintiff acted as a prudent man of business. It will of course be a question of fact in each case whether he acted unreasonably in not entering into a forward contract. (*Paysu, Ltd.* v. *Saunders*[5].) It is also fairly clear that in such cases the *onus* rests on the defendant to prove that the plaintiff could reasonably have mitigated the damages in that manner.

The cases referred to above are no doubt cases under the Sale of Goods Act but the principle underlying them would seem to be one of wider application in the law of contracts. Thus it is said that "if a charterer refuses to load the agreed cargo, the master should do what he prudently can to get another

5. (1919) 2 K B 581 (C A.) 6. (1920) 1 K B 693 at 697.
7. (1921) 2 K.B. 369 (C A).

cargo, at as good a freight as may be had, and so avoid sailing empty". (Carver's *Carriage by Sea,* 7th Ed., p. 991.) In *Harries* v. *Edmonds*[8] Baron Parke took the view that if the contract had been broken by the freighter not putting any cargo on board within the stipulated time, it was the captain's duty to take a cargo at the most he could get so that the damages to be paid by the freighter should be reduced as much as possible. In that case, however, it appears that the freighter's agent did in fact offer a substituted cargo. Whether it is the shipowner's duty to endeavour to obtain a fresh cargo is answered by the later case of *Wilson* v. *Hicks*[9] It was held that the conduct of the captain in remaining inactive at the port of loading and declining to go to some other port in the hope of obtaining a cargo was unreasonable and that he could not recover full freight. In *Smith* v. *M'Guire*[10] Martin, B., threw out an observation that the shipowner was not bound to go and look for employment for his ship in order to relieve the charterer from the consequences of the breach. This was, however, by way of *obiter* and has not been followed in later decisions. In *Aitken Lilburn & Co.* v. *Ernsthausen & Co.*[11] the above case was cited but no reliance was placed on the observation of Martin, B. In fact the counsel who appeared for the plaintiffs seems to have thought it unarguable and A. L. Smith, L.J., says: "It is not disputed that when the defendant refused to perform his obligation (to load cargo) it was incumbent upon the plaintiffs to do what was reasonable to mitigate the damages......and that, if the plaintiffs could reasonably obtain other cargo to fill up the space which the defendant had wrongfully refused to fill up, they were bound to do so." A similar view was expressed by Mathew, J., in *Nickoll & Knight* v. *Ashton, Edridge & Co.*[12] and the same was approved by Vaughan Williams, L.J., on appeal.

In the converse case, if there is default on the part of the carrier to provide the means of conveyance, it has been held that the freighter must reasonably utilise such other means of conveyance as may be available. *Irvine* v. *The Midland Great Western Railway (Ireland) Company*[13] is illustrative.

8. (1845) 1 C. & K 686
9. (1857) 26 L. J Ex 242.
10 (1858) 3 H & N 554 157 E R 589.
11. (1894) 1 Q.B. 773 (C A.) at 781 per A L Smith, L J.
12. (1900) 2 Q B. 298 at 305, on appeal (1901) 2 K B. 126 (C A.) at 138 *per* Vaughan Williams, L J
13 (1880) 6 L. R. Ir. 55

The railway company committed a breach of contract in refusing to provide the agreed type of wagons for loading hay. The plaintiff kept the hay for some time and sold it for a much smaller price than what it would have fetched if it had been sold at the place of destination. It appeared, however, that the plaintiff could have got some other type of wagons or at any rate that he could have sent them to the place of destination by cart track. It was held that the plaintiff could recover by way of damages only the extra charge of conveyance that might have been incurred if those other means of conveyance had been availed of by him.

Take again an ordinary contract of letting or hiring. *A* agrees to let his house to *B* at a certain rent. *B* refuses to take the house and is sued for damages. It is submitted that the proper measure of damages in such a case is the loss of rent suffered by *A* after deducting such sums as he might and ought to have recovered as rent from another person if he had taken reasonable steps to secure another tenant. *British Steamship Automatic Delivery Co., Ltd.* v. *Haynes*[14] was a case of contract of hiring. The defendant wrongfully refused to accept the machines which he had hired for a period and the plaintiffs made no attempt to re-let the same. It was held that the measure of damages was the amount of the rent from the time the machines were tendered until the expiration of such a period as the plaintiffs would require in order to re-let the same to somebody else. This ruling will be directly applicable to the converse of the Privy Council case which has been indicated above.

The rule as to the plaintiff's duty to minimise damages has also been applied in cases of breach of contract of service. Both in *Smith's Law of Master and Servant* (7th Ed., p. 114) and in the notes to *Cutter* v. *Powell*[15] (*Smith's Leading Cases,* 12th Ed, p. 57), the rule is stated somewhat cautiously. It is said that "if the servant could have obtained other employment of a precisely similar kind which a reasonable man would have accepted he can only recover nominal damages." It is not quite clear whether they intended to approve of the rule that the employee is under an obligation to *look for* other employment after the date of his wrongful dismissal. It may be said that in *Macdonnel* v. *Marsden*[16]

14. (1921) 1 K B 377
15. (1795) 6 Term Rep. 320
16. (1884) Cab. & E 281.

and *Brace* v. *Calder*[17] which are the cases relied on, substituted employment had been *offered* to the employee. But the rule in its extended form had been laid down by Erle, C.J., in the earlier case of *Beckham* v. *Drake*[18] where he says: "The measure of damages for the breach of promise of service is obtained by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained...... and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use reasonable diligence to find another employment". It cannot therefore be said that the plaintiff's duty ends with accepting the offer of an alternative employment. In many cases such employment may not be procured without his taking certain steps. It will, of course, be a question of fact what steps he should take and what kind of employment he should accept.

What is the application of the rule to the case of a breach of contract of marriage? If *A* promises to marry *B* after ten years and breaks it the next day, should *B* go about and see if some other suitable alliance can be obtained. The injured party might feel so disappointed that she might choose to remain a spinster for the rest of her life. In such a case can her conduct be styled unreasonable? While it would be ludicrous to hold that any such duty is cast upon the injured person it cannot be ignored that if as a matter of fact some other suitable marriage is arranged the party in default can plead the same in mitigation of damages. The difficulty in applying the rule as to mitigation in its extended form arises in such a case because of the peculiar nature of a marriage contract. In such a case the damages are for the bodily or mental pain of the injured party and the action is more *ex delicto* than *ex contractu*.

Thus it will appear fairly well settled that in a case of anticipatory breach the plaintiff is under a duty after accepting the repudiation to endeavour to obtain substituted performance if such a course appears reasonable. This is merely an application of the broader principle enunciated by Loreburn, L.C., in *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corpora-*

17. (1895) 2 Q.B. 253 (C.A.).
18 (1849) 2 H.L.C. 579 9 E.R. 1213 at 1223.

tion[19] that "even those who have been wronged must act reasonably." The substance of the rule was also laid down by Haldane, L.C., in *British Westinghouse Electric & Manufacturing Co.* v. *Underground Electric Railways Co. of London*[20] in the following words: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second which imposes on a plaintiff the *duty* of taking all reasonable steps to mitigate the loss consequent on the breach and *debars* him from claiming any part of the damage which is due to his neglect to take such steps".

Under the Indian Law the rule as to mitigation is stated quite broadly in the explanation to section 73 of the Contract Act as one applicable to all kinds of contracts. It says that "the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account." Both in *Jamal* v. *Moolla Dawood Sons & Co.*[21] and in the case under discussion the Privy Council has recognised the general principle that the plaintiff should mitigate the damage. Whether it is his duty to enter into a forward contract in order to get substituted performance has not however been so frequently raised. The point was discussed in an early case which came up before the Sindh Judicial Commissioner's Court and one of the Judges was inclined to follow *Roper* v. *Johnson*[3] (See *James Finlay & Co., Ltd.* v. *David Sassoon & Co.*[22]) In another case which came up before the Rangoon High Court the question seems to have been answered though without reference to authorities. In *Ma Hnin Yi* v. *Chew Whee Sheih*[23] the defendant failed to place a rice-mill at the disposal of the plaintiff during the paddy season. In an action to recover damages their Lordships Heald and Chari, JJ., held that "if it had been proved that the plaintiff could have obtained some other mill then he was only entitled to the difference between the rent reserved under the lease and the rent he would have to pay for the other mill". As it was, the learned Judges had to decide the case in the absence of any evidence, but the position seems to have been recognised that the plaintiff was under a duty to endeavour to get

3. (1873) L.R. 8 C.P. 167.

19 (1908) A.C 323 at 326

20. (1912) A.C. 672 at 689.

21. (1915) L.R. 43 I.A 6: I.L.R 43 C. 493: 30 M.L.J. 73 (P.C.).

22. (1912) 27 I.C. 102

23. (1925) 90 I.C. 635: A.I.R 1925 R. 261.

substituted performance and that the defendant should prove that he could do so. The principle was also applied by the Madras High Court in a case of improper termination of a lease by the lessee. (*Govindasami Chettiar* v. *Palaniappa Chettiar.*[24]) It was held by Ramesam, J., that the lessor was under a duty to mitigate the damages by taking new tenants for the unexpired period of the lease for a smaller rent.

It would thus seem that in the case under discussion the Privy Council proceeded on too narrow a view of the rule as to mitigation of damages. If their Lordships had decided the case on the ground that it was a mixed question of law and fact and that the defendant should have proved not merely that there were other mills at which the cotton could have been ginned, but also that they would have been available if necessary steps had been taken, there may be nothing to say against it. As it is, the statement of law extracted in the headnote that "the plaintiff was not bound to buy cotton and have it ginned at other mills under his obligation to mitigate the damages" seems to be too broadly worded. The question being one of some nicety and of great importance to the commercial world it is hoped that when the matter arises again there will be a fuller and more authoritative pronouncement on the point.

B. V. VISWANATHA AIYAR.

SUMMARY OF ENGLISH CASES.

GRAY AND OTHERS *v.* PERPETUAL TRUSTEE COMPANY, LTD. AND ANOTHER, (1928) A.C. 391.

Mutual Wills of husband and wife—If can be revoked by the wife—Effect of wife taking benefits under the husband's Will—Terms of husband's Will not putting her to election—No approbation and reprobation.

Mr. and Mrs. Hargrave made Wills simultaneously in each other's favour. The husband died first and the wife took the benefits conferred upon her by the husband's Will. Subsequent to his death, she executed another Will which interfered with the provisions of her prior Will. Their Lordships held that the evidence did not establish any binding contract between the husband and the wife not to revoke the Wills and that the mere fact of making Wills mutually is not by itself evidence of an

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24. (1925) 48 M.L.J. 397.

agreement between the husband and the wife and that 'without such a definite agreement there can no more be a trust in equity than a right to damages at law'. *In re Oldham* [(1925) Ch. 75] approved.

On the further question of election, *held* that there was nothing in the language of the husband's Will which either put the wife to her election, or put her in the position of seeking at the same time to approbate and reprobate its provisions.

In re STOKES. BOWEN *v.* DAVIDSON, (1928) Ch. 716.

Will—Bequest of legacies—Time for commencement of interest on the legacies—Death of the testatrix or a year after death—S. 43, Conveyancing Act, 1884.

By a Will and codicil, a testatrix bequeathed three sums of money (referred to as funds *A, B* and *C*) to trustees of the Will upon different trusts. The question was as to the time from which interest was payable on the three funds. *Held* "that the ordinary rule is that a legacy carries interest only from a year after death, save in certain circumstances, as, for instance, where a testator gives a legacy to his infant child or to a person to whom he stands in *loco parentis;* but it may however be inferred from the context of the Will that a legacy not *prima facie* carrying interest is intended to carry interest from the date of the death;" the bequest of a sum with power to maintain out of income is an indication that interest must run from death and it is not necessary that there must be in the Will an imperative trust to maintain out of income. As regards the two sums *A* and *C, held,* there was a clear intention appearing in the Will that the sums should carry interest from death; with regard to the sum *B,* there was nothing special from which, if the fund stood alone, it could be so inferred, but from its being one of a group of three legacies, two of which clearly carried interest from death, *held B* also carried interest from death.

ROBINS, *In re*. HOLLAND *v.* GILLAM, (1928) Ch. 721.

Trusts—Costs of necessary repairs to trust premises—Whether to be borne by capital or income—Trustee's discretion—Not interfered with if bona fide*—Court's powers to decide.*

A testator devised in favour of certain trustees appointed by his Will his real estate and directed them to pay the income arising from them to a class of persons during their lives and

on the death of the last survivor of that class, the estate to be sold and the proceeds thereof divided amongst another class of persons then ascertainable. The trustees in the course of due management of the estate effected certain necessary repairs to the trust premises and applied to the Court for directions as to how the expenses of repairing should be borne as between capital and income.

Held, that both under section 102 of the Settled Land Act, 1925 and section 28, clause (2) of the Law of Property Act, 1925, the trustees have a discretion to allot the expenses either to capital or income and if the trustees should exercise it *bona fide,* the Court will not interfere with it. But if the trustees without exercising it themselves apply to the Court for directions, the Court is free to determine the question with due regard to the principle laid down in such cases as *In re Hotchkys* (32 Ch. D. 408).

SPENCER AND HAUSER'S CONTRACT, *In re,* 97 L.J.Ch. 335.

Immoveable property—Vendor and purchaser—Contract to make title in a particular capacity—If amounts to a warranty to make title in that capacity—Purchaser if can repudiate.

In a contract to sell real estate, the vendors were stated to be selling as trustees for sale under a Will; they were in fact legal personal representatives of the testator. The question raised was whether the purchaser can be compelled to accept the title which they could give as such legal personal representatives when they could not make title in the capacity in which they stated they would make it. *Held,* that as a man who enters into a contract to sell land, stating that the title begins with a certain document, may make title in any way he can, so too if a man contracts to make title in some particular capacity, that is only a warranty that he will make a good title and not that he will make it in the particular form. The contract does no more than indicate the way in which the vendor is contemplating to make a title.

JOHNSON *v.* CLARKE, (1928) Ch. 847: 97 L. J. Ch. 337.

Specific performance—Contract for sale of real estate—Described as subject to a tenancy from year to year—Tenant setting up an option to purchase and option for a lease—If purchaser can repudiate on that ground—Court's duty to de-

cide validity of tenant's title—Agreement to tenant signed by one executor only—If sufficient.

The defendant in the action had agreed to purchase certain freehold property consisting of cottages and a dwelling-house (Sandwell Grange) with lands adjoining, but he refused to complete the purchase on the ground that, a third party Richards set up an agreement with the plaintiffs (executors) giving him an option of purchase and an option for a lease for his life at the same rent. The agreement was contained in a letter signed by one of the three plaintiffs alone as for himself and his co-executors but it was found that this had not been communicated to the co-executors. In the contract for sale the tenant was described as a tenant from year to year and the purchaser had notice only of that.

Held, that Richards was only a tenant from year to year and it was beyond the powers of the vendors as personal representatives to grant an option to take a lease for an indefinite period at the same rent.

The Court in an action for specific performance has, according to the modern practice, to decide on the facts proved in the case, if the third party claimant has a reasonable chance of success in an action against the purchaser, even though the decision may not bind the third party interested. But if there is any mode by which the question can be effectively determined in such a manner as will bind all the persons interested in the estate—by originating summons or something of that sort—the Court will not then force a title upon the purchaser.

In re MASON, (1929) 1 Ch. 1.

Limitation—Ex gratia *grants by Crown of lunatic's funds—Claim long after, by alleged next-of-kin's representatives—Mistake of fact—Starting point of limitation—Intestates Estates Act,* 1884, *Section* 3.

In 1926 certain persons claiming to be the representatives of the next-of-kin of a lunatic who died in 1798 presented a petition of right asking for payment to them of the lunatic's personal estate which was then with third persons under an *ex gratia* grant from the Crown. In the course of administration proceedings relating to the estate of the lunatic's father the Master had reported that she had no heir-at-law or next-of-kin and that had been confirmed by the Court. Relying on

this, the Crown had made the grants in question subject to any claim or right of any person who should thereafter by due course of law prove himself to be her next-of-kin. It being contended that the petition of right was barred by limitation,

Held, that it was barred by section 3 of the Intestates Estates Act of 1884. On the finding of the Master, which was confirmed by the Court, the title of the Crown to the estate was immediate and effective (the estate being *bona vacantia*) and Crown took and held it as of right and not in trust for any person.

Even as an action to recover money paid under a mistake of fact, the statute must be taken to have run from the date of payment and not from the date of discovery of the mistake nor from the date when the plaintiff might have discovered it by the exercise of reasonable diligence.

Quaere.—If *Rustomji* v. *Queen*, 1 Q.B.D. 487, is good law.

SMITH *v.* WOOD, (1929) 1 Ch. 14.

Principal and surety—Charge by several persons of their respective properties for the whole debt—Release of one property from security without the consent of the other parties—Effect of—Quantum of prejudice if material.

A number of persons deposited their respective properties with the defendants and charged them with the repayment of a debt due to the defendant. They did not undertake any personal liability but each of the properties was charged with the whole debt. One of the properties was withdrawn from the charge. *Held*, that the principles of law applicable to sureties apply to all cases where adjustment of rights *inter se* by contribution or marshalling arises. The creditor cannot make a particular and separate bargain with one of the depositors releasing the security put up by him from liability without the consent of the other parties to the deed, the extent of the alteration or prejudice thereby being immaterial.

WELD *v.* PETRE, (1929) 1 Ch. 33.

Mortgage of shares—Loan not repaid—Shraes transferred to mortgagee's name—Dividends, etc., received from the company by mortgagee—More than enough to pay off the mortgage money with interest—Redemption action on originating summons—Time limit for redemption of mortgage of personalty

—*Delay more than 12 years—Claim for accounts of dividends received.*

The action was brought to redeem a mortgage of shares in a limited company. The mortgage was effected 26 years before to secure a loan of £1,000 repayable in three months with interest. The loan was not repaid but the mortgagee to whom the shares had been transferred had received from the company direct by way of bonus, dividends, etc., more than enough to cover the mortgage amount with the stipulated interest. The defence was that the claim was stale and barred by limitation, laches and acquiescence.

Russell, J., and on appeal, the Court of Appeal negatived the proposition that in the absence of a statutory bar for redemption of mortgages of personalty, the Court ought to apply the 12 years rule of limitation on the analogy of the Statute of Limitations relating to land, and further *held* that unless the right to redeem has been destroyed by statute, foreclosure, sale or release, equity should not deprive mortgagors of their right to redeem, if when they assert it, the debt has been or can be repaid, the security is available, and there has been no change in the position of the mortgagee or any one claiming under him which would make it unjust, or inconvenient, or impossible to restore the parties to their original position. But if the mortgagor who could object, lies by and knowingly permits another to alter his position, it will amount to acquiescence and in that case, even a shorter period of delay would constitute a sufficient ground for refusing relief.

Per *Lawrence, L.J.*—There is no rigid rule that every equity must be acted upon at the utmost within 20 years and if not so acted upon will be barred. The only question is if "it would render it practically unjust to give the plaintiffs their remedy."

The Court of Appeal (differing from Russell, J.), *held* that in a redemption action, an order for payment by the mortgagee of the amount which his estate has been overpaid may be made on an originating summons.

Distinction between bar by limitation, laches and acquiescence pointed out.

TILLING-STEVENS MOTORS, LTD. *v.* KENT COUNTY COUNCIL, (1929) 1 Ch. 66.

Revenue—Petrol-electric motor—If 'electrically propelled' —Finance Act, 1926, *Section* 13, *Sch. I, para.* 5.

Is a vehicle called the petrol-electric motor an "electrically propelled" vehicle within the meaning of para. 5, Sch. I of the Finance Act, 1926? The primary motive power of the motor is the usual four cylinder internal combustion engine operating by the combustion of petrol coupled through a spring drive to an electric generator which transmits its power to an electric motor which drives the rear wheels through a cardan shaft and differential gear.

Held, by the Court of Appeal (Russell, L.J. dissenting) reversing the decision of Clauson, J. that it is not an electrically propelled vehicle. The vehicle only provides a simpler method of running in what is a petrol-driven vehicle. Petrol is the essential for the car as without it the electricity cannot be generated to drive the rear wheel.

Russell, L.J.—The test of the statute is not prime source of power, but electrical propulsion. The engine whose motive power is petrol does not propel the vehicles but what propels the vehicle is the electric motor.

LAWRENCE *v.* GEORGE MATHEWS LTD., (1929) 1 K.B. 1.

Workmen's Compensation Act, 1925—*Commercial travelling agent—Fatal accident by a tree falling while homeward—Agent choosing his own vehicle and prescribing his own journeys—Injury if arose out of and in the course of employment.*

A commercial travelling agent of a company, while returning home from a journey during which he had secured some orders for the Company, was fatally struck on the road by a falling tree blown down by a severe gale. The agent had under his contract to defray his own travelling expenses and prescribe his journeys. The agent's widow brought this action for compensation under the Act and the question was if the accident arose out of and in the course of his employment.

Held, by Sankey and Russell, L. JJ., that the accident arose out of and in the course of the employment as the incidence of the agent's employment took him within the zone of special danger. The fact that the accident was abnormal and not

necessarily incident to the performance of his employment is immaterial; the immediate event, the fall of the tree, is sufficient and there need be no other connection between what happened and the nature of the agent's work.

Per Lord Hanworth, M.R., dissenting.—The accident did not arise out of the employment, as the agent was at the spot of his own choice and not at the direction of the company—the manner, method and time of transit being selected by him. Further it is not an incident which normally occurs but only if the forces of nature are exercised upon the tree and to such a mishap all persons in the locality are liable.

LAKE *v.* CRONIN. HUNT *v.* CRONIN, (1929) 1 K.B. 31.

Revenue—"Bookmaker"—Employee in charge of a Bookmaker's office with authority to accept bets up to a fixed amount if a Bookmaker—Finance Act, 1926, *Section* 18.

The appellant was a salaried employee of a Bookmaker. He had sole charge of the premises in the absence of his master and though he had no authority to open new accounts with any one in his master's absence, he could accept personal bets and bets over the telephone up to a *certain* amount fixed by his employer. He had no responsibility but merely answered the telephone and recorded messages.

Held, that the employee was a "Bookmaker" within the meaning of section 18, sub-section (1) of the Finance Act, 1926, as he is a person who, as servant or agent of another person, carried on, whether occasionally or regularly, the business of receiving or negotiating bets, or who holds himself out or permits himself to be held out as a person who receives or negotiates bets.

It is not necessary to be "a servant or agent of another person" within the meaning of the section that he should be clothed with such a complete authority as to be the duplicate original of the person, whose servant or agent he is.

THE KING *v.* COUNTY OF LONDON JUSTICES, ETC., (1929) 1 K.B. 81.

Rating—Valuation (Metropolis) Act, 1869—*Valuation under—Appeal to Quarter Sessions—Appeal lodged in time—Section* 42, *sub-section* (13) *re. time for hearing appeal if imperative.*

The Port of London Authority was assessed under the Valuation (Metropolis) Act, 1869, at a certain valuation. The Port Authority preferred in time an appeal against the valuation and assessment. But the Quarter Sessions could not dispose of the appeal before the 31st March, the date fixed by section 42, sub-section (13) of that Act for determination of appeals against valuations. The question was raised whether the decision of the appeal after the 31st March was invalid and without jurisdiction.

Held, that the fixing of the date was in a sense imperative; but if for reasons beyond the control of the parties—like glut of business in Court, accident or reasonable adjournments—the appeal is not disposed of, the Quarter Sessions have jurisdiction to hear it even after that date.

Lord Esher's decision in *Reg* v. *County of London Justices* [(1893) 2 Q.B. 476] approved.

ADAMS *v.* CAMFONI, (1929) 1 K.B. 95: 98 L.J.K.B. 40.

Licensing Act, 1921, *Section* 4—*Licensee's servant selling liquor during prohibited hours—Sale without licensee's knowledge and against his order—Liability for sale by the servant.*

The respondent (a licensee) was prosecuted for unlawfully selling whisky through his agent in the licensed premises during other than business hours. Though the agent was in the licensee's employ as a messenger boy, the sale was against the orders of the licensee and not done in the course of performing any duty delegated to him by the licensee.

Held, the licensee is not an insurer warranting that no unauthorised person on his premises will supply his goods to customers during other than the permitted hours.

Quaere.—If it will be different if the boy was honestly, though mistakenly, intending to serve his master's interests in supplying his master's customers on credit.

[Section 4 runs thus:—"No person shall, except during the permitted hours (*a*) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor."]

THE KING *v.* JOB WHITEHEAD, (1929) 1 K.B. 99: 98 L.J. K.B. 67.

Criminal law—Charge of carnally knowing a girl between 13 *and* 16 *years—Girl's story to her mother several months after—If amounts to corroboration of girl's evidence—Arrest*

by police—Constable cautioning accused—Silence of accused before constable—If can infer corroboration.

The prisoner was charged with carnally knowing a girl between 13 and 16 years of age. In the course of his summing up, the Judge directed the jury that though the statement made by the girl to her mother several months after the occurrence was not admissible in evidence, yet what the girl said could be inferred from what the mother did (*viz.*, charging the accused with the offence) and treated as corroboration of the girl's evidence in the box. Further that the jury were entitled to infer from the silence of the prisoner when charged by the constable that the girl's story is true and corroborated.

Held that, both were misdirections. Any inference as to what the girl had told her mother could not amount to corroboration of the girl's story, because it proceeded from the girl herself and was merely the girl's story at secondhand. Further it was not made at the first opportunity but several months after. Also the non-denial of the charge by the prisoner after the warning by the constable that, whatever he said would be taken down in writing and used in evidence could not be corroboration.

JAWETT, *In re*, 98 L. J. Ch. 7: (1929) 1 Ch. 108.

Bankruptcy—Object of Public Examination—Incriminating question—Bankrupt, if can refuse to answer.

In an action against a retail tradesman for infringement of the Patent of a Company by sale of certain lamps, the Court restrained the infringement by the tradesman and ordered costs to be paid by him to the Company. For non-payment of the costs, the tradesman was adjudged a bankrupt. At the Public Examination, the Registrar asked him to disclose the source from which he got the lamps; but he refused to answer those questions on the ground that his answers might incriminate people who had trusted him. *Held,* that unless the bankrupt showed that the question was irrelevant, he may be compelled to disclose the information. The object of the Public Examination is to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public and not merely in the interests of the creditors.

PARKES GARAGE (SWADLINCOTE) *In re,* 98 L. J. Ch. 9.

Company—Debenture in favour of some creditors—Insolvent circumstances—Floating charge created—Independent covenant to pay principal and interest—Payment of principal and interest—Subsequent winding up within three months—Payment if can be recalled—Companies (Consolidation) Act, 1908, *Section* 212.

To satisfy certain of the pressing creditors, a Company in embarrassed circumstances executed a debenture, whereby it covenanted to pay on demand to a trustee for the creditors, the principal and interest due on the debenture and further created a floating charge over all its property and assets for the payment thereof. The Company paid off the amount shortly after. But within three months of the debenture, proceedings were commenced for its winding up at the instance of another creditor. The liquidator filed this summons under section 212 of the Companies Act, 1908, to set aside the charge created by the debenture and to recover the amount paid by the Company to the trustee.

Held that, in the absence of proof that the Company immediately after the creation of the charge was solvent, the charge was invalid—the winding up having commenced within three months of the charge. But section 212 cannot affect the covenant for principal and interest contained in the debenture and the payment cannot therefore be recalled except in proper proceedings to set aside the transaction as a fraudulent preference.

HOULDER, *In re.* H. C. RABBIDGE (TRUSTEE) *v.* EAGLE STAR DOMINIONS INSURANCE CO., 98 L. J. Ch. 12.

Bankruptcy of surety—Payment by a co-surety between the date of receiving order and proof—If must be deducted.

One of the sureties who had guaranteed the whole of the principal debtor's debt became a bankrupt. Between the date of the receiving order and the date of the proof, a co-surety had made certain payments to the creditor towards the principal debt. The question arose if the creditor could prove for the whole debt due on the date of the receiving order without giving credit to the amounts collected from the co-surety.

Held, except in claims arising in connection with negotiable instruments, the creditor can (in the surety's bankruptcy), prove for the whole debt, without deducting the sums received

from a third party—not the principal debtor—provided that he does not receive in the whole more than 20 shillings in the pound, including the amounts he had got from such third person (the co-surety here).

EGYPTIAN DELTA LAND AND INVESTMENT CO., LTD. *v.* TODD, (1929) A.C. 1: 98 L.J.K.B. 1.

Income-tax—Company registered and incorporated in England—Business entirely carried on outside—Registered office alone in England—If Company resides in England.

A Company was incorporated in England under the Companies Acts in 1904. Except for a registered office and a formal secretary with no authority to do anything more than the law strictly required the Company to do, the whole of its business was since 1907 controlled, managed and carried on at Cairo, outside the United Kingdom. No business was at all transacted in England. The Company was assessed to income-tax in respect of interest arising from mortgages or rents arising from leases of land in Egypt on the ground that the Company was "a person resident in the United Kingdom".

Held (by the House of Lords), the question where a Company resides is mainly a question of fact. Registration is one of the facts to be taken into consideration in determining the residence of a Company but not necessarily the sole and exclusive fact. For income-tax purposes, the residence depends on other facts, *e.g.*, the mode and place from which it controls and directs its affairs.

Were the question independent of authority and there were not the new Rule 7 of the All Schedules Rules to the Income Tax Act, 1918, Lord Warrington of Clyffe would probably incline to the view that as a cumulative effect of the provisions in the Companies Act *re.* the effect and duties of registration, whatever other residence the Company may have, the Legislature has provided that the registered office shall be a residence.

Cesena Sulphur Co. v. *Nicholson,* 1 Ex. D. 428 and *De Beers Consolidated Mines* v. *Howe,* (1906) A.C. 455 followed.

Swedish Central Ry. Co. v. *Thomson,* (1925) A.C. 491 distinguished.

JOTTINGS AND CUTTINGS.

Street Offences.—The Report of the Committee which was appointed rather more than a year ago by the Home Secretary, with the Right Hon. Hugh Macmillan, K.C., as Chairman, has presented a carefully thought out and common-sense report, which, subject to a few reservations by individual members, is unanimous. The terms of reference to the Committee were "to enquire into the law and practice regarding offences against the criminal law in connection with prostitution and solicitation for immoral purposes in streets and public places and other offences against decency and good order, and to report what changes, if any, are in their opinion desirable". Naturally commencing by ascertaining the state of the law as it at present exists, the Report calls attention to the fact that the penal law with regard to prostitution and solicitation is founded on special legislation rather than on any principle of the common law. And the statute law on the subject is in a decidedly unsatisfactory state. The Metropolitan Police Act, 1839, affects the Metropolitan Police District; the Town Police Clauses Act, 1847, which is now incorporated in the Public Health Act of 1875, is applicable to all urban districts but not to the metropolis, though a number of the larger towns have local enactments dealing with this subject; whilst Scotland has a comparatively recent consolidating measure, the Burgh Police (Scotland) Act of 1892, which applies to almost all burghs except Edinburgh and Aberdeen, which have their own Acts. And there are, of course, numerous authorities throughout Great Britain which have power to make, and do make, bye-laws dealing with prostitution and solicitation within their own areas. The Committee recommend that the law on the subject, whatever it may be decided that the law ought to be, should be made uniform throughout the country, and that the multifarious general and local enactments which at present deal with solicitation between the sexes should be repealed and replaced by a specific enactment of general application.—*L.J.*, p. 400.

The Problem and the Remedy.—In considering what, if any, changes in the law should be made, the Committee were faced with a very delicate problem. Remembering always that immorality between the sexes is not an offence, and that no one suggests that it should be made such; bearing in mind on the one hand the importance of maintaining order and

decency in the streets and of ensuring that persons are not subjected to annoyance, and, on the other, the necessity of making sure that charges in respect of street offences should be satisfactorily proved; the framing of suggestions for the amendment of the law obviously presented great difficulties. At present it is necessary in England, but not in Scotland, to prove the fact of annoyance to the person solicited. As the Committee point out, it is only in the rarest cases that the person solicited is willing to give evidence, and the annoyance is usually proved by the evidence of a constable who states that the man accosted "appeared to be annoyed". It is recommended that the requirement of proving annoyance should be eliminated and that it should be made an offence to importune any person of the opposite sex for immoral purposes. It is suggested that the word "importune" shall be construed as referring to acts of molestation by offensive words or behaviour. It is proposed that loitering by prostitutes shall be dealt with by providing that a person who frequents any street or public place for the purpose of prostitution or solicitation so as to constitute a nuisance shall be guilty of an offence, but that the evidence of at least one person aggrieved shall be necessary for a conviction. If these suggestions are carried out, the result will be that the law will be the same for both sexes, and that in charges of importuning, a constable would no longer have to infer annoyance on the part of the person solicited, but would confine himself to what he saw and heard. This would be a real improvement. The Committee make a number of valuable observations with regard to evidence by the police and the employment of plain clothes and women police. We particularly welcome two of their suggestions—the first that gratuities from members of the public to the police for services rendered should be forbidden; and the second, that the requirements as to entering into recognizances when appealing from summary convictions should be altered. As we have repeatedly urged, and as the Committee point out, the present state of the law on this subject makes the right of appeal purely nominal in the case of poor persons.—*L.J.*, p. 400.

A Memorial to Lord Haldane.—It is stated in *The Times* that at a meeting held at the House of Lords on Wednesday, at which Lord Justice Sankey presided, it was resolved to raise a fund to commemorate Lord Haldane. As to the propriety of such a memorial there can be no question. Lord Haldane's

services as Lord Chancellor place him very high in the succession of eminent men who, as "Victorian Chancellors," or later, have occupied the Woolsack, and it is well known that with his legal ability and services there were combined contributions to practical administration and philosophic thought, which in either domain would have placed him in a high position. Such an association of talent and service is not likely to recur.—*L.J.*, p. 419.

The New Judge.—Although speculation as to who would be selected to succeed the late Mr. Justice Salter had been singularly small, the appointment of Sir Malcolm Macnaghten, K.C., occasioned no surprise. He had, indeed, been freely "tipped" on the occasions of each of the last few vacancies, and it had for some time been recognised that, if he desired judicial honours, his elevation to the Bench, in due course, was a practical certainty. If less familiar to the public than some of the "stars" of the King's Bench Division, Sir Malcolm has been well known to those practitioners who require a sound and painstaking leader for "heavy" cases; and he has enjoyed a substantial and growing practice before the Judicial Committee of the Privy Council. Sir Malcolm Macnaghten joins the select band of Judges whose fathers preceded them on the Bench; the others are Lord Justice Russell, Mr. Justice Romer, Mr. Justice Finlay and Mr. Justice Charles. Of Lord Macnaghten's fame it is unnecessary to say even a word; it will endure as long as cases continue to be cited in the Courts. Sir Malcolm's appointment is welcome on personal grounds, and it is an added source of satisfaction to the profession that the Bench again includes a bearer of the great name of Macnaghten.—*L.J.*, p. 419.

Portia's Lament.—Are the women having fair play? A correspondent, writing in the *Sunday Dispatch* of the 16th inst., suggests—or more than suggests—that they are not. He (or she) has taken "a census of the opinions of several young women now at the Bar. There is no doubt of their feelings in the matter." One of them roundly declares that "solicitors are the most pig-headed reactionaries in the world". Another could give "an enormous list of women as highly qualified as any male junior". And a spirit of revolt is rising. "We are not going to stand it." The correspondent concludes: "It is revealing no secret to state that several prominent women bar-

risters are now considering what steps they may take to ventilate their grievance."—*L.J.*, p. 420.

A Word in Season.—A certain acidity and snappiness, in interchange between Bench and Bar in Court, has at times been apparent during the old year. In County Courts on some occasions, and in the High Court more than ever, observers have noted it with uneasiness and acute discomfort; and it is to be hoped that these rare verbal displays will be voluntarily and altogether suppressed. They give to the enemy occasion to blaspheme; and they are profitable to none. Circumstances of general aggravation may exist; and if the temptation is greater than they can bear, it is for Judges and Counsel to pray that they be not led into temptation. For this little homily the season and the importance of the subject are my excuse.

Such incidents are not peculiar to the dead legal year. Rebukes were in the past from time to time administered to Counsel from the Bench, and Counsel on various occasions retorted in kind. The right of the Judge to rebuke Counsel is established—all depends on how it is done. "There is due," says Francis Bacon, Viscount St. Albans, "from the Judge to the advocate some commendation and gracing where causes are well handled and fair pleaded, especially towards the side which obtaineth not; for that upholds in the client the reputation of his counsel and beats down in him the conceit of his cause."—*L.J.*, p. 451.

Rebuking Counsel.—"There is likewise," said Francis Bacon, "due to the public a civil reprehension of advocates, where there appeareth cunning Counsel, gross neglect, slight information, indiscreet pressing, or an over-bold defence." He makes no reference to the converse situation—the reprehending of Judges by those appearing before them. But in the past there have been occasions when members of the Bar have entered firm protests against judicial comments or actions with the full support of the public and their fellow-practitioners.

It was Mr. Benjamin, Q.C., who made a silent rejoinder to the learned Law Lord who ridiculed his argument—he tied up his papers, bowed and retired. But Sir Richard Bethell (afterwards Lord Westbury) preferred to speak when he fell foul of Knight-Bruce, L.J. Sir Richard was appearing for

a solicitor in whose favour a solicitor had executed a deed of assignment for costs and money assigned to her. In the Court below the deed was set aside, and the solicitor appealed. "I am astonished," said Knight-Bruce, L.J., during the opening of the case, "that an experienced professional gentleman should have been so imprudent." "Your Lordship," said Bethell, "will hear the case first, and if your Lordship thinks it right you can express surprise afterwards." Nor did Mr. Charles Russell, Q.C., fail to speak his mind when he thought that James, L.J., was wanting in courtesy to the Bar.—*L.J.*, p. 451.

A Good Story.—A member of the Bar, not richly endowed with intellect, after years of brieflessness, married a rich wife. She died. Again he sought a bride with a rich dower ; and once more became a widower. Therefore he thought he would resume his long-neglected practice at the Bar. He approached an old friend, who had meanwhile become a Judge of the Supreme Court, and asked what, in his opinion, would be the wisest course for him to pursue. "If I were you," replied the Judge, "I should stick to the Probate and Matrimonial."—*L.J.*, p. 451.

From the Bar to the Pulpit—A Nephew of Mr. H. Labouchere, M. P.—On Saturday, December 29, the Bishop of Coventry will institute the Rev. Edward Labouchere Ruthven Thornton, curate of Brockenhurst (Hants), to the benefice of Walton d'Eivile, near Warwick. He is a nephew of the late Mr. Henry Labouchere, M.P., Editor of *Truth*, and elder brother of Mr. Maxwell Thornton, late Liberal M.P. for Tavistock. Qualifying for the Civil Service, and entering the Inner Temple, he went to India in 1891, serving in various capacities, the most important being Collector (Chief Administrative Head) of Madura District—a post he held when King George visited that country as Prince of Wales—and District and Sessions Judge of Trichinopoly. Shortly after he vacated the latter office his successor was assassinated by a disappointed litigant.

While on furlough in 1910 Mr. Thornton secured a First in the Bar Final, and was called to the Bar. In 1915 he joined the chambers of Sir Edward Marshall Hall. The war made it necessary for him to return to India, where he served in the Defence Force and became enrolled as an advocate of the Calcutta and Madras High Courts. On his return to England in

1925 he began practising before the Judicial Committee of the Privy Council, where he "led" early in 1926 in a sensational case, *Skipp* v. *Kelly*, from Bangalore.

Finally, after discussing the matter with his old schoolfellow, the Bishop of Winchester, he decided, in view of the shortage of men in the Church, to take holy orders, and was ordained deacon by his lordship in 1926, and priest the following year. Since his ordination he has been curate of Brockenhurst, and was for six months in sole charge of the parish during an interregnum that occurred between the resignation of the last and the institution of the present Vicar.—*L.J.*, p. 454.

Legal History in Palatable Form.—Professor Holdsworth's inextinguishable pipe must have drawn well when he delivered the lectures which make up the latest, lightest and most interesting of all his books—*Dickens as a Legal Historian* (Humphrey Milford: Oxford University Press). The Courts and the Dwellings of the Lawyers; the Lawyers, Lawyers' Clerks and other Satellites of the Law; *Bleak House* and the Procedure of the Court of Chancery; *Pickwick* and the Procedure of the Common Law; such are the first courses of this delightful feast.

The author shares the views—and cites them more than once—of Mr. Theobald Mathew as to the high value of Dickens as a legal historian. "The story of the suit for breach of promise of marriage brought by Mrs. Bardell, widow, against Samuel Pickwick, gentleman, is a mine of useful information to the antiquarian. Has not the time come for an annotated edition of that masterpiece, to which the student-at-law may be referred by readers and lecturers for a reliable account of the practical working of the law of personal actions when Queen Victoria ascended the throne?" Thus Mr. Mathew, and Professor Holdsworth thus: "I propose to show how, not only *Pickwick*, but many of the other novels of Charles Dickens, can be used to illustrate the legal history of his period." And he does.—*L.J.*, 1929, p. 14.

The Bear Garden.—A reference to the description of Judges' chambers in *Pickwick* is followed by the citation of the witnesses who gave evidence before the Common Law Procedure Commissioners in 1831; from which source it may very well be that the Bear Garden derives its name. Said Mr. Thomas Lott, an attorney: "The rule office on that first day

of term is a perfect bear garden; and when there has been a great pressure of business, and those dirty little holes, the Judges' chambers, much crowded, I have seen oaths administered through the window to deponents in the courtyard, and persons excepting to bail compelled to make their exit through a back window rather than encounter the crowd."

It was not long after *Bardell* v. *Pickwick*, according to Mr. Theobald Mathew, that Parliament was petitioned in vain to provide more seemly quarters; "and the squalor, the crowd, and the fight to get into the Judge's room were features of a barrister's daily work" till the opening of the Royal Courts of Justice in 1882.—*L.J.*, p. 14.

A Company's "Residence".—A Limited Company, like any other corporation, is a person, though only by a legal fiction; but there has always been difficulty in ascertaining the "residence" of this fictitious person for the purpose of income-tax. "It is easy," said Lord Loreburn, L.C., in the *De Beers Case* [(1906) A. C. 455, 458], "to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied......A company cannot eat and sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business." Accordingly, the test that a Company resides where it is registered was discarded in favour of the test—where is its real business carried on? And this, as Lord Loreburn further said, is a pure question of fact to be determined according to the course of business and trading. In that case it was held that the De Beers Consolidated Mines, Ltd., was resident here, since the real control in all the important business of the Company, except the mining operations, was exercised here; although the Company was registered in South Africa, and the head office was there and the general meetings were always held there.—*L.J.*, p. 22.

Residence both Here and Abroad.—A step further was taken in *The Swedish Central Railway Co.'s Case* [(1925) A.C. 495], where it was held that a Company could have more than one residence for the purpose of income-tax. The Swedish Railway Company was registered here, and its business was at first controlled from London, but subsequently it altered its articles so as to enable the control and management of the business to be transferred to Sweden. This was done, but the

Special Commissioners found that the Company was resident here, and the House of Lords refused to disturb this finding; only, however, because the Company could have two residences. "The central management and control of a Company," said Lord Cave, L.C., "may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence." In the recent case of *Egyptian Delta, etc., Co.* v. *Todd* [(1929) A.C. 1], the contention that a Company's residence depends on the place of its incorporation was revived, and it was argued for the Crown that incorporation under the Companies Act, with the attendant statutory obligations, made the Company resident here. The Company was incorporated here in 1904, but its business was in 1907 transferred to Cairo, and since then it had been controlled and carried on entirely in Cairo. Under these circumstances the Company was held by the House of Lords, reversing the Court of Appeal [(1928) 1 K.B. 152] to be resident in Egypt, and resident there only. It seems to have been assumed that in the *Swedish Central Railway Co.'s Case* some business was done in this country so as to justify the finding of a double residence. But this was not so in the present case, and the fact of incorporation here seems to have been regarded as of slight importance. The case is specially interesting for the illuminating judgment of Lord Sumner, and particularly for his remarks at page 32 on the drafting of amendments to the Income Tax Act, 1918.—*L.J.*, p. 23.

A Dickens Chancellor.—Lord Lyndhurst, the Lord Chancellor of *Bleak House,* in whose Court Charles Dickens functioned as a reporter, could, according to the book of legal anecdotes, make a joke and admit a fault.

When Brougham was once decrying the salary attached to a new Judgeship, observing that it was all moonshine, Lyndhurst observed: "It may be; but I fancy you would like to see the first quarter of it." On another occasion, growing weary of a slow-going counsel, he observed, in an audible undertone, "This fellow is a fool." Later, becoming aware of the merit of the argument, he spoke in a low voice, "Not so great a fool as I thought." At the end of that excellent address he was filled with admiration and remorse, and audibly muttered, "I was the fool." Such is the story told by Lord Romilly, who had it from a Registrar of Lord Lyndhurst's Court.

And the words used of the Lord Chancellor in *Bleak House* would fit him: "He dismissed us pleasantly, and we all went out, very much obliged to him for being so affable and polite; by which he had certainly lost no dignity, but seemed to us to have gained some."—*L.J.*, p. 33.

CONTEMPORARY LEGAL LITERATURE.

In an article in *The Law Quarterly Review* (July 1928) headed "Recent changes in Family Law," Mr. Edward Jenks examines the provisions of the Guardianship of Infants Act, 1925, the Summary Jurisdiction (Married Women) Act of the same year and the Legitimacy and the Adoption of Children Acts of the year 1926 to see how far they conform to the accepted tests of sound legal reform in a system like the English, which professing to be the expression of the good customs of the realm and not claiming to be an *ideal* code whether of divine or human origin, has to accord with enlightened public opinion and be workable in practice. He points out that English Family Law has been drastically overhauled by legislation and judicial interpretation within the last century and become almost unrecognisable. The obvious ideal, according to the author, which these changes have had before them has been absolute legal equality in the position of husband and wife. These Acts have removed the risk that that ideal runs of the parents making the children of the marriages mere powers in their perpetual struggle for equality and they accordingly enact that in considering any question regarding the custody or upbringing, or the administration of the infant, the infant's interests and not the rights of the parents, shall be the paramount consideration.

Mr. Jenks then proceeds to indicate certain fundamental objections to the Legitimacy Act of 1926, Summary Jurisdiction (Separation and Maintenance) Act of 1925, and Guardianship of Infant's Act of 1925. The main object of the Legitimacy Act is "to lay down the rule that a person born out of wedlock shall be made legitimate for all purposes (except the inheritance of political privileges and property settled to go therewith) by the subsequent marriage of his natural parents, subject to one exception, viz., that this rule will not apply to persons either of whose natural parents was married to a third person. This rule does not require the concurrence of the parents for legitimation. The non-provision of a penalty in the Act for

failure or refusal by the parents to re-register the child as legitimate, the author points out, will necessitate the person who claims to be legitimated to take steps to establish his legitimacy, which only means opening up an arena for family scandals and nullification of the advantages of legitimacy, *e.g.*, succession to property.

The Summary Jurisdiction Act provides that application for a separation and maintenance order may be made by a married woman, even though she has not in fact ceased to reside with the husband; and under the Guardianship Act, the mother of an infant may, while she is actually living with her husband, apply to the Court for the sole custody of her child and a weekly allowance for it. The learned author points out that whatever the intentions of the promoters of the Act may have been, the provisions are calculated more to turn a working-class household into a hell for the wife and children.

In the Adoption of Children Act, the author would add two more restrictions, *viz.*, (1) on the number of children who may be adopted, and (2) on the powers of parents of large natural families. At the same time he would like to completely identify the adopted child with its adopted family. The Act does give the child rights of intestate succession to the property of its adopted parent and the latter is not given rights of succession to the property of the adopted child should it die intestate, though it might have been acquired mainly through the generosity of his adopted parent.

The October number has a critical note on (1928) A. C. 181 doubting the interpretation put by the Judicial Committee on section 64 of the Hongkong Bills of Exchange Ordinance, 1885 (corresponding to section 64 of the English Bills of Exchange Act). The respondent accidentally mutilated a banknote, the material portions of it were however found and patched up but the number of the note was destroyed. Their Lordships held that "the contract here has never been altered and is sufficiently evidenced by the mutilated document and the verbal testimony" and the number was not material to the note.

The *Review* questions the decision in so far as it holds on an interpretation of the section that it "relates only to alterations effected by the will of the person by whom or under whose directions they are made, and that it does not apply to a change due to a pure accident." The writer argues first

that under section 64 grammatically construed, a material alteration *however made* will avoid the bill unless it is one which has been assented to by the parties and that it is not necessary that it should be an alteration to which all parties *might* assent; and, secondly, that as an unauthorised alteration by a stranger avoids and discharges the bill (except as against a person who made or assented to it) there can be no difference in principle whether that stranger is a mouse or an unauthorised third party.

The note however agrees that the interpretation adopted by the Judicial Committee is a desirable one from the standpoint of justice and points out that the American Courts declined to follow the doctrine of the English Common Law as repugnant to justice.

[For a full discussion of the question, we would refer our readers to Taylor on Evidence, §§1820-21 and §§1827-29. Lord Buckmaster, who delivered the judgment under notice, thinks that *Davidson* v. *Cooper,* the leading English case on the question, does not cover the case of an accidental alteration, but only of a fraudulent alteration effected by the party or carelessness permitting it to be effected by another. In Leake on Contracts (7th Edition), p. 604, it is stated that "a contract is not affected by an alteration caused by mere accident" though "the party claiming under it must prove the accident and the original state of the instrument".

By sections 87-89 of the Negotiable Instruments Act the English Law on this subject has been adopted in this country.]

In a long article headed "Specific Performance and Doubtful Titles" published in the *Law Journal* (December 1 and 8, 1928), Mr. E. P. Hewitt, K.C., LL.D., examines in detail the history of the old rule that a title, the acquisition of which may involve a law suit, will not be forced upon a purchaser. That this view prevailed at least down to 1862 is clear from the fact that Mr. Sugden in the 8th Edition of his "Vendors and Purchasers" (pp. 385-386) published in 1862, says, "To enable equity to enforce specific performance against a purchaser, the title to the estate ought to be free even from suspicion, for it would be an extraordinary proceeding for a Court of Equity to compel a purchaser to take an estate which it cannot warrant to him." The tide changed by the time of *Alexander* v. *Mills* (6 Ch. 824) for there the Court of Appeal decreed specific performance though the Court below had

thought the title doubtful. The Court then felt that "it must determine, as it best may, what the law is, and to take that to be the law which it has so determined". But there was a set-back when Lord Selborne in *Palmer* v. *Locke* (18 Ch. D. 381) stated that *Alexander* v. *Mills* did not shake the law laid down by a long series of earlier decisions. Recently, the Court of Appeal in *Re: Nichols and Von Joel's Contract* [(1910) 1 Ch. 43] held the old rule to be still in force and Cozens Hardy, M.R., considered that (in cases involving construction) it ought now to be "more readily adopted". But in *Smith* v. *Colbourne* [(1914) 2 Ch. 533], the same learned Judge said, "Lastly, it was urged that the title is too doubtful to be forced upon a purchaser. The Courts have in modern times not listened with favour to such a defence"; in *Johnson* v. *Clarke* [(1928) Ch. 847: 97 L. J. Ch. 337], Maugham, J., has held that except when there is an easy mode by which the vendor could bring all persons interested in the estate before the Court, the Court is bound to decide any question of title between vendor and purchaser and to decide whether on the evidence which is produced at the hearing of the action for specific performance, the objection to title is good or bad.

The result of these various decisions, Mr. Hewitt says, would seem to be to leave the old rule, that a doubtful title will not be forced upon a purchaser, very much where it was. The rule still holds good; but its application depends in a large measure upon the character of the doubt and the degree in which it may be entertained. If the question on the title relates to some point of general law, the Court will generally act upon its own opinion of the law, unless there are conflicting decisions, or for other reasons the point is one raising grave doubts. But if the difficulty is one arising upon the "construction of a particular instrument," the Court is more disposed to refuse to force the title upon a purchaser; and this is so, whether or not the difficulty is one which can be readily disposed of by taking out an originating summons. In *Johnson* v. *Clarke* the difficulty arose upon the construction of "a particular instrument," drawn in very loose and ambiguous language—or, to use the words of James, L. J., in *Alexander* v. *Mills*, an "ill-expressed and inartificial instrument" The option for purchase which it purported to give to Mr. Richards was no doubt invalid; but it was extremely difficult to determine precisely what his rights under the instrument were. It is very material to bear in mind that the

learned Judge said that if there were "some easy method of ascertaining whether Mr. Richards has got the rights which he no doubt claims under the document, I am not at all sure that it would not be right for me to refuse the present order and to say that the vendor should clear his title; but I do not see that there is any easy method of determining that question." It is important also to notice that the objection did not relate to some possible claim which might at some future time be made; the claim had already been made, and the claimant was in actual possession. The prospect of litigation, therefore, was not remote, and the contention of the purchaser that the title should be cleared before he was compelled to complete the purchase seems to have been reasonable.

Messrs. Pollock and Mulla seem to think that this rule could not have arisen except in connection with the peculiar relations of Chancery to Common Law jurisdiction in England, and the anxiety of Chancery Judges to keep on good terms with the Common Law by being astute not to decide a purely legal question if they could help it. In India the case is covered by section 25 of the Specific Relief Act and the only question for consideration is whether the title is free from reasonable doubt. *See* 47 Bom. 369.

BOOK REVIEWS.

THE ADVOCACY SERIES, VOL. V—PREPARATION FOR TRIAL AND CONDUCT OF CASES, by Messrs. P. Ramanatha Aiyar and N. S. Ranganatha Aiyar. Price Rs. 4.

Here is a collection of all the essentials with which a lawyer should be equipped in order to make his career a complete success. It may not be always a golden principle in this profession, to be trying to imitate best examples, since it rarely happens, successes at the bar have been similar in their nature. Individual genius plays often a supreme part in shaping the course of each man's advance towards the summit. Yet it is better to place before the vast majority who are not above the average, many stimulating prescriptions for an efficient preparation and conduct of cases. The first few chapters of this book contain information for general guidance to those striving for a standard. It is a matter for gratification that some of the best rules for training oneself in the art of a trial lawyer have been enumerated from Judge Donovan's book. The concluding

pages are filled with too many nice cuttings from famous trials, just to be illustrative of the various qualities that have made lawyers of repute, still linger in our memory.

It is with pleasure we accept this volume.—K.C.

THE TRIAL OF EUGENE MARIE CHANTRELLE. Edited by A. Duncan Smith. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

This is again an interesting but strangely pathetic case of a murder of a wife by a husband. The prolonged agony of their married life with the unhappy end of Madame Elizabeth Chantrelle as its climax, is briefly told in the introduction to this volume. The Counsel for the defence, Mr. Trayner, spared no pains to show that death might have been the consequence of an accidental escape of coal gas from a broken pipe hard by. But the Lord Advocate Watson by his persuasive argument and with much medical and chemical evidence had convinced the Judge and the Jury that signs were not wanting to prove that it could not have been anything but a case of narcotic poisoning. Moreover the witnesses on the spot had deposed to the extreme probabilities of an administration of poison by Mr. Chantrelle to his wife. The presiding Judge, Lord Clerk Moncrief, had to rely on the whole evidence however circumstantial it may look.

This being one of the conspicuous trials in the annals of Scottish jurisprudence, we cannot pass without more than the usual word of praise at the high endeavours of the editor in bringing out its publication.—K.C.

THE LAW OF EVIDENCE IN INDIA, by M. C. Sarkar, 4th Ed., by S. C. Sarkar, published by M. C. Sarkar & Sons, Calcutta. Price Rs. 16.

This is the fourth edition of a well-known treatise. Sarkar's Law of Evidence in India has for some years been treated by the legal profession and the Bench as the leading treatise on the subject and has been consulted for enlightenment on all points arising under the Indian Evidence Act. It is therefore unnecessary to dilate upon its merits. It is sufficient to say that the present edition has incorporated the large number of decisions on the admissibility of the statements to the Police in the course of an investigation which have arisen under section 162 of the

Civil Procedure Code of 1898 as amended by Act XVIII of 1923. We need only add that the whole book has undergone a thorough revision and that all decisions up-to-date have been noticed and considered wherever necessary.

THE LAW OF SUCCESSION CERTIFICATE IN BRITISH INDIA, by Mohan Lal and Kapurchand. Expert Law House Series, Bhatnagar Book Agency, Fazilka. Price Rs. 2-8-0.

This is a commentary on the sections of the Indian Succession Act of 1925 dealing with succession certificates. These sections substantially re-enact the provisions of the Succession Certificate Act of 1889. They are the provisions which are largely resorted to outside the Presidency towns. A treatment of those sections with the decisions under them is therefore not uncalled for. The authors have with a view to enhance its usefulness incorporated not merely the decisions of the Chartered High Courts but of all the superior Courts in British India. The provincial amendments of the Court Fees Act and the several model forms and rules made by the superior Courts will be found useful in practice. It has to be noticed that the authors have not rested content with giving references to the decisions but have offered suggestions of their own wherever necessary which will provoke thought on the various points The author has also kept in view the needs of the University Students and the general reader in giving the outlines and the summary of the law on the subject.

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REFORMS IN THE HINDU LAW OF WILLS, MAINTENANCE AND RESIDENCE.

DESIRABILITY OF EMPOWERING A CO-PARCENER TO MAKE A WILL OF HIS SHARE IN JOINT PROPERTY.—As the law stands at present, a co-parcener cannot execute a will, in respect of his share or a portion thereof in joint property, in favour of any person whatsoever, whether related or not related, whether male or a female. For example, it has been held that a will made by a Hindu father, who is joint with his infant son, bequeathing certain family property to his widow for her maintenance is invalid and inoperative as against the son, although it would have been a proper provision made by the father during his life-time. *Subbarami Reddi* v. *Ramamma.*[1] Similarly a will by which a testator gives part of his property to his intended adopted son, part to his widow for life, part to kindred, and part to charity is not binding upon the adopted son, although, before the adoption took place, the natural father executed a deed by which he consented to the provisions of the will and gave his son in adoption subject thereto. *Krishnamurthi Aiyar* v. *Krishnamurthi Aiyar.*[2] A member of a joint family who has got no son and whose estate will pass by the operation of the rule of survivorship to his joint brother cannot, by will, give his share in the property to his widow or daughter as stated already, but if a few minutes before the execution of his will he makes an unequivocal declaration of his intention to separate as was the case in *Girja Bai* v. *Sadashiv*[3] then his share passes to his widow and daughter, even if he does not make will in their favour. It is not desirable that such a declaration of an intention to separate should be the condition precedent to the validity of the will. The will itself is a suffi-

1. (1920) I.L.R. 43 M. 824.
2. (1927) L.R. 54 I.A. 248: I.L.R. 50 M. 508 at 509 53 M.L.J. 57 (P.C.)
3. (1916) L.R. 43 I.A. 151: I.L.R. 43 C. 1031: 31 M.L.J. 455 (P.C.)

cient and unambiguous declaration of his intention to treat himself as a person entitling to dispose of the property as if he were a tenant-in-common and should be treated as valid.

2. DESIRABILITY OF RESTRICTING THE POWERS OF A TESTATOR IN RESPECT OF HIS SEPARATE OR SELF-ACQUIRED PROPERTY.—Though in respect of joint property a co-parcener cannot execute a will, he can execute a will in respect of his self-acquired property and can, by such a will, commit great injustice; for example, if a person possesses only self-acquired property, he can by his will entirely disinherit his adopted son, who would not have been given in adoption to him at all if he were to exercise such a power, to the knowledge of the natural parents of the adopted son. That he can disinherit his natural son, his widow, his daughter or any other near relations goes without saying. Mr. Mayne in his Hindu Law discusses the question about the origin of Hindu wills at an elaborate length in paragraphs 406-408-416, pages 568-582 and states his conclusion to the effect that though the true origin of the testamentary power is to be sought for in the Brahmanical influence, the example of Englishmen making wills must have acted as a cause of its being adopted by the Hindus to whose law the idea of a will was entirely unknown. If the source of Hindu wills is to be traced, not to the authorities on Hindu law, but to some external influence, it is quite certain that its origin from the English source would be considered to be more plausible than its origin from the Mahomedan law, because the Mahomedan law of wills is not so absurd as the English law, followed in the Hindu Law, is. As is often pointed out, a person can, according to English Law, ignore the needs of his own widow and family, though he must contribute towards the support of other men's widows and children towards pensions, health insurance, and free public education, etc., by means of paying the Death Duties, which sometimes rise to as much as 40 per cent. on large estates. In the disposal of his estate, the testator can act like an unchallenged autocrat by entirely rejecting the claims of his relations and dependants, by devising his entire fortune to the favourites of an hour, and even where he may be charitable in bequeathing a portion to his wife and children, the bequest may be hedged around with harsh conditions militating against the happiness of the legatees. The testator can bring ruin upon the members of his family by benefactions made in favour of public charities and may thus act contrary to the rule that charity should begin at home. The

last will and testament of a wealthy individual thus becoming a terrible source of misery has its analogue in the Roman Jurisprudence which permitted the Romans to frame their arbitrary wills according to the dictates of reason or caprice, as they thought fit. In Rome from various causes the partiality of paternal affection often lost its influence over the stern patriots of the commonwealth and the dissolute nobles of the empire; and if the father bequeathed to his son the fourth part of his estate, he removed all grounds of legal complaint. But a rich childless old man was a domestic tyrant, and his power increased with his years and infirmities. A servile crowd, in which he frequently reckoned prætors and consuls, courted his smiles, pampered his avarice, applauded his follies, served his passions, and waited with impatience for his death. The arts of attendance and flattery were formed into a most lucrative science; those who professed it acquired a peculiar appellation; and the whole city, according to the lively descriptions of satire, was divided between two parties, the hunters and their game. Yet, while so many unjust and extravagant wills were every day dictated by cunning, and subscribed by folly, a few were the result of rational esteem and virtuous gratitude. Cicero, who had so often defended the lives and fortunes of his fellow-citizens, was rewarded with legacies to the amount of a hundred and seventy thousand pounds.[4]

3. ANALOGOUS LAW REGARDING WILLS TO BE FOLLOWED — An exception to the absolute testamentary power has just been introduced in England by section 4 of the Adoption of Children Act, 1926, 16 and 17 Geo. V, c. 29, which enables a Court to make an order requiring the adoptive father to make a just provision for the adopted child at the time of adoption. A similar provision may be made in India. According to Mahomedan Law the claims of the heirs are not entirely neglected. They have got a right at least to a substantial portion of the property of the deceased. A Mahomedan can bequeath only one-third of his property and two-thirds go to the heirs. If the Hindus would have followed the principles adopted by the Mahomedan Law as they did in adopting the Mahomedan Law of Pre-emption instead of following the principles which are adopted by the English law, the disastrous consequences mentioned above arising from the absolute power of the owner to make the will would not have arisen. The rise and progress of the testamen-

4. Gibbon's *Decline and Fall of the Roman Empire,* Chap. VI, p. 159. Everyman's Library Series.

tary capacity in England has characteristically, features not quite, if at all, scientific.[5] According to the laws of other countries besides England, such a liberty in the matter of disposal of property is not permitted. In Greece, the will was valid, if the testator had no children.[6] In the United States, homesteads generally and dower estates frequently are not devisable. In some States children cannot be disinherited without good cause; and in some, children omitted in a will may still take their share. It is frequently provided that certain amount must be left to the widow. Some States require husband's consent and subscription to make a wife's will valid. In Germany, descendants, ascendants and the husband or wife are entitled to compulsory portions. But they may be deprived of these for certain specified kinds of misconduct. Subject to this a wife can will away her property without the husband's consent.[7] According to the French law, a widow is entitled as a matter of law to one-half of her deceased husband's movable property, while if there are surviving children, as much as three-quarters of the testator's estate will be distributed as the law directs, instead of under the terms of the will, and this restriction applies to *wills as well as to gifts.*[8] According to Hindu Law, a person can bequeath entirely his self-acquired property in favour of anybody, but he cannot bequeath the smallest fraction of joint family property in favour of his own widow or daughter, and a golden mean between the two would be very desirable. A member of the joint family should be allowed to execute a will of his share or a portion thereof in joint family property but in case where that will gives the estate to a stranger to the family the interest of the persons who would have inherited the share of the testator if he would have been a tenant-in-common should be protected. Similarly the powers of a testator as regards his self-acquired property should be curtailed. The testamentary capacity should extend only as regards the one-third of the rights and interests belonging to the testator and two-thirds thereof should devolve by operation of the law of inheritance.

4. MAINTENANCE OF A PREDECEASED SON'S WIDOW —It has been held that the widow of a predeceased son has no legal claim for maintenance against the separate or self-acquired property of her father-in-law.[9] If there is any case of con-

5 *Encyclopaedia of the Laws of England,* Vol. 14, p. 662

6 Plutarch's Lives, solon. Everyman's Library Series, Vol. I, p. 135.

7. *Encyclopaedia Brittanica,* Vol XXVIII, pp 658, 659 (Ed. 1911).

8. *French Civil Code,* Arts. 913—919.

sensus of opinion, where the opinion is wrong, it is here. A layman, who has got a slight knowledge of the ceremonial of marriage, will say that this is a wrong view. It should be enacted that a predeceased son's widow is entitled to maintenance out of the separate or the self-acquired property of the father-in-law and that the maintenance should be a charge on the property by operation of law.

5. It has been held by the Bombay High Court that the widow of a predeceased unseparated son has no right of maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property. *Bai Parvati* v. *Tarwadi Dolatram*.[10] The Madras High Court has, however, taken a contrary view in an earlier case where it was held that the right was enforceable in such a case as against volunteers. *Rangammal* v. *Echammal*.[11] As the decision in the Bombay case is likely to be followed because it is subsequent to the Madras decision, it is necessary to legislate on the point and effect should be given to the Madras view, which is more just.

6. Maintenance of Widowed Daughter.—If a widowed daughter cannot get maintenance from her husband's family on account of there being no property and if she returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right, to charge her maintenance upon her father's estate in the hands of his heirs. This is the view which prevails in the Bombay High Court, *Bai Mangal* v. *Bai Rukmini*[12] and was adopted by the Calcutta High Court also in a case governed by the Bengal school, where it was laid down that a *sonless widowed* daughter in *indigent* circumstances was not entitled to separate maintenance out of her father's estate which descended to his heirs. *Mokhada Dassee* v. *Nundo Lall*.[13] The Madras High Court has dissented from this view in a case which is not reported in the official reports. *Venkatarasu* v. *Kotayya*.[14]

7. To be a widow is itself a misfortune, the torments of which are aggravated by there being no son to maintain her and the indigent circumstances make the matters still worse. It is necessary that the law should be changed on this point.

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9. Mayne's *Hindu Law*, paras. 451—453, pp 647—49

10. (1900) I.L.R. 25 B. 263.

11. (1899) I.L.R. 22 M. 305: 9 M.L.J. 14.

12. (1898) I.L.R. 23 B. 291.

13. (1901) I.L.R. 28 C. 278.

14. (1912) 23 M.L.J. 223: 16 I.C. 139.

If a daughter is allowed to inherit as a co-heir with the son, she can maintain herself out of the property which would fall to her share. But if the daughter is not allowed to inherit as a co-heir by changing the law on the point, it should be laid down that a daughter is entitled to maintenance out of her father's estate if she cannot be properly maintained in her husband's family and such a maintenance should be declared to be a charge on the property by operation of law.

8. FIXED COURT-FEE OF TEN RUPEES FOR RECOVERY OF ARREARS OF MAINTENANCE AND FOR A DECLARATION ABOUT MAINTENANCE.—Women, who are driven to file a suit for maintenance, have generally no property out of which they can pay the Court-fees and hence they are required to sue as paupers. There are very few cases where the question of pauperism is not contested by the defendant. Even where the Court finds that the plaintiff is a pauper and allows her to sue as such, she is required to put up with great harassment. Sometimes the judge of the lower court gives a wrong decision but the order is not appealable, and though according to some courts the order is open to revision in a proper case, it is not so according to others.[15] It is necessary that in order to prevent the plaintiff being harassed, there should be an amendment in the Court Fees Act and a fixed fee of ten rupees should be levied in such cases. A clause (*vii*) should be added to Article 17 of Schedule II of the Court Fees Act for dealing with this matter. As according to clause (*v*) of Article 17, a suit to set aside an adoption can be filed on a ten rupees stamp, there should be no objection for including a suit for maintenance within the scope of that Article.

9. MAINTENANCE TO BE A CHARGE ON THE ESTATE.—It has been held that even express notice at an execution sale under a decree to the effect that a widow has a claim for maintenance upon the estate does not affect the rights of the purchaser. *Soorja Koer* v. *Nath Buksh Singh*.[16] The reason is stated to be that a Hindu widow's right to receive maintenance is considered to be a right of an indefinite character, which, unless made a charge upon property by agreement or by a decree of the court, is only enforceable like any other liability in respect of which no charge exists. *Ram Kunwar* v. *Ram Dai*.[17] It should therefore be pro-

15. Mulla's *Civil Procedure Code*, p 833.

16 (1884) I.L.R. 11 C 102.

17 (1900) I.L R. 22 A. 326.

vided that where a person has got a right of maintenance out of the property belonging to a Hindu, that property will stand charged with that right by operation of law within the meaning of section 100 of the Transfer of Property Act. This will necessitate some consequential changes in section 39 of the Transfer of Property Act.

10. CHARGE IN FAVOUR OF A WIDOW ON ACCOUNT OF HER RIGHT OF RESIDENCE.—Under the Hindu Law, a widow cannot assert her right of residence in a house which has been sold away, unless a charge is created in her favour prior to the sale. *Gangabai* v. *Jankibai.*[18] By act of parties such a charge can be created. It should be now provided that such a charge exists by operation of law.

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SUMMARY OF ENGLISH CASES.

BEVAN *v.* NIXON'S NAVIGATION CO., (1929) A.C. 44: 98 L.J.K.B. 26.

Workmen's compensation—Collier—Disablement from miner's nystagmus—Consequent inability to work at the face—Subsequent recovery and fitness to work only at the surface—Inability to obtain employment at the surface—Amount of compensation—If as on total or partial incapacity.

A collier skilled to work at the face of the mine contracted the industrial disease of nystagmus which rendered him unfit for work at the face. He was for a time paid full compensation but as he subsequently improved in health and became fit for work at the surface, the employer applied for reduction of the compensation on the ground that the workman was then "able to earn wages" by employment at the surface. The arbitrator had found that though the miner was physically fit for work at the surface, yet he could not in fact get surface work in the market on account of labour conditions.

Held, by the majority (Viscount Dunedin, Lord Phillimore and Lord Carson)) that "able to earn" in para. 3 of the 1st schedule of the Workmen's Compensation Act, 1906, only means that he is in such a physical condition as to be able to earn and that alone and does not include the proviso of employment if the workman fairly attempts to get it and that the later Acts of 1923 and 1925 further confirm this construction.

18. (1920) I.L.R. 45 B 337.

Cardiff Corporation v. *Hall,* (1911) 1 K.B. 1009 approved.

Per *Lord Shaw* and *Lord Blanesburgh* dissenting.—The measure of damages given in the statute is not the difference of earning *power* but the difference *in fact* between what was earned in wages before the accident and what he is earning or is able to earn after the accident, meaning by "able to earn" not mere physical ability to *work* but to *earn* in fact in the market.

VISCOUNT TREDGAR *v.* HARWOOD, (1929) A.C. 72.

Landlord and Tenant—Lease—Lessee to insure in "Law Fire Office or in some other responsible office to be approved by lessor"—If lessee can insure with some other responsible office against the will of the lessor and when Law Fire Office practicable—If lessor can withhold consent arbitrarily—Reasonableness, what is.

The action was brought for possession of a leasehold on the ground that there had been a forfeiture of the lease by reason of a breach of covenant by the lessee's assignee in that he failed to insure the premises in the Law Fire Office. The material portion of the covenant was: "The lessee shall and will insure and ever after....keep insured the said messuage.... demised against loss or damage by fire....in the Law Fire Office or in some other responsible office to be approved by the lessor." The lessor was the owner of many hundreds of houses and intended all his houses to be insured with the same office for convenience and on that ground refused to approve of the respondent's insuring the messuage with the Atlas Company, though admittedly a responsible office. The question arose if under the covenant, insurance with the Law Fire Office was obligatory and the lessor could withhold approval without assigning any reasons therefor.

Held, by the majority (*Lord Blanesburgh* dissenting) that the case was one of one sound office being named, with the alternative given of another responsible office, it being a condition precedent to the alternative being resorted to that the lessor approved of that office. The lessor's refusal need not be reasonable or for justifiable causes. Cases where there is a special clause to the effect that the consent shall not be withheld unreasonably stand on a different footing. Further the lessor acted reasonably in insisting, on grounds of business convenience, that all his houses shall be insured with one office and in deciding reasonableness, motives

of convenience and interest which affect the lessor are to be considered and not those which affect somebody else.

Lord Blanesburgh.—The gist of the covenant is that the office selected by the lessee and tendered for approval shall be responsible. The lessee is given the option of fulfilling his obligation either (*i*) by insuring in the Law Fire, or (*ii*) by insuring in some other office approved by the lessor, the only preference for the Law Fire Office being that no approval is necessary for insuring with it. The reason for refusal of consent must be relevant to insurance protection and not extraneous to it.

MEDWAY OIL AND STORAGE COMPANY *v.* CONTINENTAL CONTRACTORS, (1929) A.C. 88.

Costs—Claim and counter-claim both dismissed with costs—Principle of taxation—Whether costs can be apportioned.

Where the plaintiff fails with costs in his claim and the defendant with costs in his counter-claim, and evidence is given of matters in controversy common to both claim and counter-claim, the duty of the Taxing Master is not, in the absence of specific directions by Court to that effect, to apportion the costs but to treat the claim as if it stood alone and allow only such extra costs on the counter-claim as were occasioned by the counter-claim and would not have been incurred but for the counter-claim. The proper mode of taxation in such a case is to give the defendant all costs incurred in resisting the claim, depriving him only of any costs which he has incurred exclusively in supporting his defeated counter-claim. This principle applies just as much where claim and counter-claim have failed as where both have succeeded.

ENGLISH INSURANCE COY. *v.* OFFICIAL RECEIVER AND LIQUIDATOR OF NATIONAL BENEFIT ASSURANCE COMPANY, (1929) A.C. 114: 98 L.J. Ch. 1.

Insurance (Marine)—Agreement between two companies—Participation agreement—Participation in profits and losses—No notice to assured of this agreement—No stamped policies issued by N. Co.—Agreement, if valid and enforceable.

Two Insurance Companies (which may be referred to as E. and N.) entered into an agreement called a *Participation* agreement by which it was *inter alia* provided (i) that the N. Co. shall be entitled to and shall accept a certain share in all the marine risks undertaken by the E. Co., (ii) that the N. Co. was to

have a share in the net premiums, salvage and other benefits received by the E. Co. and should bear its proportionate share of losses, (iii) that the E. Co., alone should settle all claims arising under its policies without reference to the N. Co., (iv) that the N. Co., should pay the E. Co., commission on (a) the net premiums paid or allowed to the N. Co. and (b) the profits derived by the N. Co. from the business under this agreement. This agreement was acted upon in honour by the two companies. There was no mention of the N. Co. in the policies issued by the E. Co. The N. Co. subsequently went into liquidation and when the E. Co., sought to prove in the liquidation in respect of claims arising under the agreement, the official liquidator rejected the claim on the ground that no stamped policy of insurance was ever demanded by or issued to the E. Co. in respect of the risks coming under the agreement.

Held affirming the Court of Appeal.—The agreement, though termed a participation agreement was an ordinary re-insurance agreement which required to be stamped. The test of whether it is a reinsurance or not is whether or not the reinsurers or the alleged reinsurers have assumed a contractual liability to the original assured and there is not, and it could not have been intended to create by this agreement, any contractual liability between the original assured and the N. Co. It is neither a partnership, nor a joint venture nor even an agreement to share the risks as between the two companies.

Per Viscount Sumner.—Even as a partnership agreement, it is difficult to see how it would have saved the parties from the application of the Stamp Act.

CANADIAN SPOON COTTON COMPANY, LIMITED *v.* CITY OF MONTREAL, (1929) A.C. 137.

Canada (Quebec)—Municipal Taxes—Resolution of Town Council exempting a prospective manufacturer—Validity of—Art. 4559 *of the R. S. Quebec,* 1888.

The action was brought by the Town Council of Montreal for recovery of Municipal taxes from the appellant Company. The appellant Company was, by a resolution of the Council exempted from taxation on the terms, among others, that it should commence to erect a mill within four months, which was duly erected. Objection was taken to the resolution and the contract that at the time they (resolution) came into existence the appellant Company was not "a person who carries on any industry,

trade or enterprise" within the meaning of Art. 4559, inasmuch as it was then only *intending* to establish a spinning mill.

Held, the words, as well as the purpose of the exemption, *viz.,* encouraging trade within the Municipality, indicated that it referred to prospective traders rather than be confined to those already there.

ADAMSON *v.* MELBOURNE AND METROPOLITAN BOARD OF WORKS, (1929) A.C. 142.

Australia (Victoria)—"Charitable institution"—Meaning of—Melbourne and Metropolitan Board of Works Act, 1915, *S.* 94.

The question raised is if the appellants as trustees of an institution known as Lost Dog's Home in Melbourne are not liable to water tax for water supplied thereto. The exemption from tax was claimed under S. 94 which reads as follows:—"In all the pipes to which any fire plug is fixed the Board shall provide and keep constantly laid on for use without charge . . . a sufficient supply of water . . . for supplying any public hospital or charitable institution or any public pumps, baths and wash-houses that may be established for the use of the inhabitants and paid for out of any city, town or borough rates . . . ."

Held, in construing Acts of Parliament it is a general rule that words must be taken in their legal sense unless the contrary intention appears. The Lost Dog's Home is a charitable institution in the technical legal sense but in the present instance the context and the history of the section exclude that meaning and give it a restricted scope referring only to municipally owned or conducted institutions.

"It is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same Legislature. *A fortiori* must it be so when resort is had for the purpose to the enactments of other Legislatures.

In re KEYSTONE KNITTING MILLS TRADE MARK, (1929) 1 Ch. 92.

Trade Marks Act, S. 41*—Registration of Trade Mark—Motion to rectify or remove the entry of the trade mark—Motion filed before seven years of registration—Seven years expired by the time of hearing—Delay not due to the applicants—Whether trade mark rendered valid under S.* 41.

The respondents moved for rectification or removal of the entry in the trade mark register entering the appellants as proprietors of a certain trade mark. By the Trade Marks Act, S. 41, "In all legal proceedings relating to a registered trade mark, the original registration of such trade mark shall, after the expiration of seven years from the date of such registration be taken to be valid in all respects" with an exception in the case of fraud. At the time the motion was launched in Court seven years had not expired but by the time of the hearing of the motion, the period had elapsed. A preliminary objection was raised that as at the date of the hearing, the seven years had elapsed, no objection could be taken as to its validity. Clauson, J., overruled the objection and also held that the Court had the power in order to do justice to antedate or post-date its judgment.

Held, by the Court of Appeal.—The Court sits to determine the rights of parties as existing at the time of the institution of the legal proceedings, whatever form such proceedings might take. S. 41 operates to confer a right upon the registered proprietor of a trade mark and does not merely lay down a rule of evidence or procedure and consequently the words "all legal proceedings" must be construed as relating to legal proceedings commenced after the relevant period of seven years had expired. As regards antedating, the Court of Appeal inclined to the view that the Court could not by antedating its order confer upon itself a jurisdiction which it did not otherwise possess.

Per Lawrence, J.—Assuming that the language of the section were equally consistent with both intentions, it is a sound rule of construction that if, without doing violence to the language employed, a statute can be construed so as to lead to a reasonable rather than an unreasonable result, it ought to be so construed.

DUCKER'S TRADE MARK, *In re,* (1929) 1 Ch. 113.

Trade Marks Act, 1905—'Bona fide *intention to use' in S.* 37, *meaning of—If an intention to use the mark on a contingency,* bona fide.

As a sort of precaution, and in order that she might have something that might be of some service to her if anything unfortunate happened to her husband, and she were thrown on her own resources, the appellant registered a trade mark for a hair dye. She had, at the time of registration, no intention of using the mark herself but only intended to form a company at a later time and transfer the mark to it with a view to its

using it. The question was raised if such a registration was proper and made with a *bona fide* intention to use the same in connexion with the hair dye.

Held, though there can be registration of trade marks with regard to goods not in being at the moment, yet there must be, at the time of registration, a real and present intention and resolve to use it in the immediate future upon or in connexion with such goods. Mere problematical intention or an uncertain possibility is not a '*bona fide* intention' within the meaning of S. 37 of the Trade Marks Act, 1905.

In re SUTCLIFFE, SUTCLIFFE *v.* ROBERTSHAW, (1929) 1 Ch. 123.

Will—Construction —Bequest to G for life and on his death without children to persons entitled as his Next of Kin —Testator's death 1875—*G's death* 1927—*Law determining Next of Kin, one in force in* 1875 *or in* 1927.

A testator bequeathed a share of his residuary estate to *G* during his life and after his death (without children) to the person or persons who, under the Statutes of Distributions of the effects of intestates, would on the decease of *G* be entitled thereto as his next of Kin in case he had then died possessed thereof intestate, the shares also to be determined under the same statutes. The testator died in 1875 and *G* died without children in 1927. The question arose as to the Statute applicable in determining the next of Kin.

Held, by Eve, J.—In the absence of anything in the context to indicate that the testator contemplated alterations in the law of Distributions, he must be taken to refer to the Statutes of Distribution in force at the time when his will came into operation—namely, his death in 1875.

In re A DEBTOR, (1929) 1 Ch. 125.

Bankruptcy—Compromise decree-debt—Petition to adjudicate for non-payment of that debt—Plea debt not real—Power of Court to go behind judgment founded on the compromise—Bankrupt then represented by leading counsel.

Upon the hearing of a petition in bankruptcy against a judgment-debtor for a receiving order on the ground that the debtor had failed to comply with a bankruptcy notice served on him, the debtor pleaded that the debt was not a real one. In the suit which had been compromised and which decree-debt was the one in question, the bankrupt was represented by a lead-

ing and a junior counsel and the compromise was effected with their knowledge.

Held, although before making a receiving order, the bankruptcy Court may go behind a judgment for the purpose of satisfying itself that the debt enforceable thereunder was a real debt, it will not do so unless a *prima facie* case is made out of unfairness or impropriety in the circumstances attending the obtaining of the compromise or judgment.

In re EMERSON MORRILL *v.* NUTTY, (1929) 1 Ch. 128.

Will—Codicil—Construction—Bequest of "residue of money"—Enlarged meaning of 'money.'

By means of a codicil a testatrix bequeathed to her adopted niece "the residue of the money at the time of my death" An originating summons was taken out to determine what property of the testatrix passed under that clause.

Held:—As a general rule money, without any explanatory context, and taken in its primary sense, cannot carry anything more than cash, and possibly money at call; it cannot cover investments or other items of personal estate, and still less can it cover real estate. But, in the context, it may get a wider meaning, even to the extent of taking in the whole personal estate.

In re FORD. *Ex parte* THE TRUSTEE. RESTALL, BROWN AND CLENNEL'S CASE, (1929) 1 Ch. 134.

Bankruptcy—Trade custom—Goods of wholesale furniture dealer with bankrupt for "sale or return"—If in bankrupt's reputed ownership.

At the date of the receiving order, the bankrupt had in his possession goods of the respondent (a wholesale dealer in furniture) sent to him on approval and for "sale or return." They were all exposed for sale in the bankrupt's shop and there was nothing to distinguish them from the rest of the goods in the shop. The bankrupt was at liberty to sell them at any price he chose, his only obligation being to pay to the respondent the price set against each article in the invoice. It was contended that those goods were in the possession, order and disposition of the bankrupt with the consent of the true owner and as such vested in the trustee to be divided amongst the creditors.

Held:—From the practice adopted between the respondents and the bankrupt, an intention appeared that the property in the goods should not pass to the bankrupt until sale. Further that

there was evidence of a notorious trade custom for wholesale furniture dealers to send furniture to retail dealers upon "sale or return" excluding the operation of the reputed ownership doctrine in the event of the retail dealer's bankruptcy.

In re FORD. *Ex parte* THE TRUSTEE. POWELL'S CASE, (1929) 1 Ch. 137.

Bankruptcy—Trade custom—Furniture dealer—Table of a private customer for sale with bankrupt—If in bankrupt's reputed ownership.

A private customer left her table with the above bankrupt with instructions to sell the same at a minimum price, any surplus sale proceeds to be retained by the bankrupt. The table was also exposed along with the other goods in the shop.

Held, no trade custom as in the above case existed exempting such articles of private customers from the reputed ownership doctrine but as the table was not distinguishable from those of the wholesale dealers, it cannot be predicated that the bankrupt's possession of the table was as a reputed owner.

THOMAS *v.* HUGHES, 98 L.J.K.B. 42: (1929) 1 K. B. 226.

Elementary education—Exemption from attending school on ground of employment refused—If the child's being employed in fact a ground of exemption or extenuating circumstance, on a charge for non-attendance.

Under the bye-laws made by an Education Committee, the parent of every child between 5 and 15 years of age shall cause his child to attend school unless there be a reasonable excuse for non-attendance. An application by the parent for exemption from attendance at school on the ground of decent employment of the child was rejected by the authorities but nevertheless the parent did not send the child to school.

On an information against the parent for unlawfully neglecting to cause the child to attend school;

Held, it will be defeating the refusal of the authorities to exempt the child to hold that *employment in fact* is a reasonable excuse and it will not even be an 'extenuating circumstance' enabling the Court to exercise its discretionary powers under the Probation of Offenders Act, 1907.

LEE *v.* MUNRO, 98 L.J.K.B. 49.

Workmen's Compensation Act, S. 4—Dependant, meaning of—Earnings of husband at the time of his death very little—

Consequent dependancy of the wife on the son—Dependant some time before death when he was in full employ—Probability of workman getting employment in future, if to be considered.

The applicant's husband died of an accident while engaged on an odd job for the respondents. He was then in good health. When in permanent employment he was paying his earnings to his wife but after he lost the permanent footing on the death of his master two years before the accident, his earnings being through odd jobs and inadequate, he was not bringing into the family exchequer the cost of his keep and his wife was living on the money contributed by her son. The question arose if under the circumstances the widow could be said to be "wholly or in part dependant upon the earnings of the workman at the time of his death" though she was in fact living on the son's money at the time of the husband's death.

Held, that unless the deceased could be considered to be a broken reed on which his wife could not depend for getting anything, the Court, in deciding whether dependancy exists ought to take into account the facts that actual payments have been made in the past and that there was a reasonable probability that if the deceased had lived he would obtain full employment again and make actual payments to his wife in the future.

REX *v.* CONFIRMING COMMITTEE OF SOUTHAMPTON, 98 L.J. K.B. 62.

Licensing Consolidation Act, 1910—*Application for removal of license—Powers of Confirming Authority to refuse—Whether pecuniary gain to applicant and loss to public of fee for New License a good ground.*

A holder of an 'on-license' for the sale of intoxicating liquor on premises applied for an order sanctioning the removal of that license from its then site to another site a little further off and better situated. The Licensing Justices sanctioned the removal but the confirming authority refused to confirm it on the mere ground that thereby the brewer will get a large increase in the monopoly value without paying anything to the public for it.

Held, that the Authority had a discretion in the matter which cannot be interfered with unless it is contrary to rules of reason and justice or contrary to law. The Authority was entitled to refuse the removal upon the sole ground that the public will thereby lose the fee for a New License.

Per Lawrence, L.J., quoting from James, L.J.—"When once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the legislature has repeated them without any alteration in a subsequent statute, the legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

JOTTINGS AND CUTTINGS.

Goodness, Cleverness, and the Woolsack.—A curious instance of how the whirligig of time brings in its revenges appears in the legal life stories of Rolfe, afterwards Lord Cranworth, and Bethell, Lord Westbury.

When Maule, J., retired from the Court of Exchequer to the Common Pleas in 1839, Rolfe was content to succeed him and had no thought of greater glory. In 1850, however, he acted as one of the Commissioners of the Great Seal during Lord Cottenham's illness, and on the retirement of Sir L. Shadwell, during the same year, he succeeded him as Vice-Chancellor and was made a peer. Two years later he became Lord Chancellor in Lord Aberdeen's Government, and continued in that office until 1858. During those years the Woolsack was for him no bed of roses, and the cause of his discomfort was none other than Sir Richard Bethell, his Attorney-General, who eventually supplanted him as Lord Westbury. That was in 1861. Four years later came Lord Cranworth's revenge. Following a vote of censure in the House of Commons touching the making of certain appointments, Westbury was compelled to retire, and Lord Cranworth became Chancellor once more. "You see, my Lord, it is better to be good than clever," a great personage is alleged to have said, in offering congratulations on his re-appointment. But the story is by some regarded as apocryphal.—*L.J.*, 1929, p. 33.

Lord Haldane's Reminiscences.—We have more than once since Lord Haldane's death referred to the variety of his great talents in the Law, in Administration, and in Philosophy, and our estimation is confirmed by the interesting series of extracts from his Autobiography which is now appearing in *The Times*. Like others before him—was not Lord Campbell an instance—there was a time when he sought to facilitate his entrance into society

by taking dancing lessons. But he was not, like Christopher Hatton, to dance into the Chancellorship, and the episode, he says, was of brief duration. Chiefly interesting to lawyers is Lord Haldane's account of his early years at the Bar. His association as a pupil with William Barber is commemorated in the edition of "Dart," which bears on its title page the names of Barber, Haldane, and Sheldon; but his career was made when Davey found that appeals in important cases could safely be left to him. There is a touch of tragedy in the story of the appeal that was interrupted by Jessel's death. The doctor, it is already on record, had told him that he was a dying man, but he went on with his work to the end. There are probably not many now who remember Haldane in practice at the Bar, but it was his grasp of legal principles then which enabled him at a later time to deliver such a judgment as that in the Birkbeck Building Society's case. Pecuniarily his progress was not so rapid as "F. E. Smith's." Only 31*l.* 10*s.* in the first year; then 109*l.* and 160*l.*, and in the fourth year about 1,100*l* Lord Birkenhead's figures, he has told us, were 120*l.*, 1,200*l.*, 3,100*l.* and 4,200*l.* We need not carry the comparison further, but Haldane had reached nearly 2,500*l.* when he gave up his junior practice and between 15,000*l.* and 20,000*l.* when he left the Bar for Ministerial office. This came near the figure which has been given for other advocates of recent times whose names and cases were thought to appeal more to the public.—*L J*, 1929, p. 41.

Payment for Convictions!—We find it difficult to credit the report, which has appeared in several lay journals during the past week, that a system has been in force in Carmarthenshire for many years, under which, where solicitors appear on behalf of the police in summary cases, they receive no fee unless a conviction is obtained. But there seems to be no doubt as to the correctness of the report, for the Llanelly justices have formally protested against the practice to the Carmarthenshire Police Committee in language which is by no means too strong:

> "We venture to think it distinctly reprehensible," they say, "that the remuneration of prosecuting solicitors should be dependent on a conviction being obtained, and we ask for advocates properly engaged to appear for the police (as often necessary and advisable) to be paid their fees even if the proceedings do not result in a conviction."

We gather that after a discussion, during which the chief constable supported the present system, the Carmarthenshire

Police Committee referred the matter to the finance committee of the Carmarthenshire County Council. It cannot be too plainly stated that the matter is not one of finance at all, but is a matter of principle of great importance. We are, as at present advised, of opinion that a solicitor who accepted instructions to prosecute for the police on the footing that he should receive no fee unless the accused were convicted, would be liable to disciplinary action by the Law Society on the ground of professional misconduct. But the importance of the matter goes far beyond this; it is well recognised that it is to the public interest that advocates should have no pecuniary interest in the result of litigation; and if this is true of civil proceedings, how much more is it true of criminal proceedings where the advocate is engaged to prosecute. The Carmarthenshire practice in this respect must be changed.—*L.J.*, 1929, p. 42.

Professional Amalgamation?—It is shocking to think of an Archbishop awaiting his turn for a "soup" at the Old Bailey; but if a clergyman who had been called to the Bar might follow concurrently the two occupations, such an event is not inconceivable. A clergyman-barrister has, indeed, had the temerity to ask the Bar Council whether he might do it; and the Bar Council has replied of course, and in effect, "Certainly not."

The number of medical practitioners who have been called to the Bar is much greater than the number of men in Holy Orders who have so qualified. Why, it may be asked, should not every professional man be required to qualify in Religion, Medicine and Law? The convenience of such an arrangement is obvious. The dying layman might have his last pill, advice as to his last will and testament, and the last religious rites from the same man; and there was a time in our history when a clergyman could, and did, perform all these services.

Consider also another advantage. There is at the moment a serious shortage of priests and an equally grave superfluity of lawyers. An easy transfer and adjustment would be a great relief. Nevertheless it is a change which I cannot recommend; and I respectfully agree with the Bar Council, and for the same reasons.—*L.J.*, 1929, p. 53.

Court Furniture at Home and Abroad.—Were it not for the courageous and indignant voice of His Honour Judge Crawford, crying out continuously for such necessaries as an adequate chair, the general public would

be unaware of the extreme difficulty of obtaining a decent piece of furniture for a court of law. Legal practitioners, and officers, of course, have long been aware of the fact. Courts without law books and without proper accommodation for lawyers, litigants and witnesses—such shortcomings have long been the unexplained commonplaces of legal life and environment in this country.

It is therefore gratifying to observe that in Paris things are no better. But, according to the Paris correspondent of a London paper, there are signs that the Palais de Justice is beginning to move with the times; it has been decided to put a telephone into the office of the public prosecutor. Not only so, but there is a rumour that the Council General of the Seine has prepared a plan for the thorough overhauling of all offices and office furniture in the Palais de Justice.

This last rumour has been received in France with general caution and local incredulity. There, as here, the official view appears to be that discomfort in the Courts is essential to wakeful efficiency.—*L.J.*, 1929, p. 53.

The General Meeting of the Bar.—A correspondent writes: "The Bar of England meets once a year, in Hilary Term, to talk about itself. Sometimes the proceedings are enlivened by debate; this year there was no debate. One notice of motion had apparently been handed in, but the subject of it was not disclosed, and the meeting was told that it had been submitted to a special committee for consideration. On the spectacular side, therefore, this year's proceedings were shorn of any particular attraction. But for all that the occasion was by no means uninteresting. The personality of the Attorney-General counted for a great deal, and the cordiality of his reception showed unmistakably that Sir Thomas Inskip is highly popular. Moreover, he 'looks the part' so completely, and his speech was a model of precision, tact, and discretion. There was a sly touch of humour in the allusion to congresses of members of the Bar; can it be that the merry twinkle originated in the learned chairman's memories of congresses of another sort? Anyway, the alternative to holding a congress of lawyers, that of inviting distinguished members of the profession in other countries to visit the Inns of Court, seems altogether admirable."—*L.J.*, 1929, p. 59.

Perjury and Divorce.—The high frequency with which perjury is committed in the Divorce Court may be an indication that the Divorce laws or the rules of evidence are in need of amendment. In no branch of the law can it be said that the current standards of social conduct are in such direct conflict with the obligations of a man's oath in the witness box. A statement of one aspect of the matter is that if it is necessary in order to save a woman's reputation, a gentleman will never hesitate to commit perjury; and that he who in such a case tells the truth is socially branded and boycotted as a cad. There can be no doubt that the judges and the magistrates are fully alive to the distressing conflict between the social and the legal code; and it is only in the rarest and clearest cases that prosecutions are instituted. Perjury is defined in 182 Geo. 5, c. 6:

"If any person lawfully sworn as a witness or interpreter in a judicial proceeding wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true he shall be guilty of perjury."

—*L.J.*, 1929, p. 61.

Prosecutions for Perjury.—A drastic way out of the difficulty would be to make certain persons incapable of giving evidence; another, to make certain kinds of evidence inadmissible either on affidavit or in the witness box; a third, to enact that certain false statements should not be deemed to be perjury. Before the propaganda of Bentham and his fellows prevailed, plaintiffs and defendants were not allowed to give evidence, on the ground that, where the parties had such a vital interest in the result, the conflict between the desire to win and the obligations of an oath was too unequal; and that in such circumstances the truth could not reasonably be expected to emerge. The view of Bentham, which was ultimately accepted, was that such considerations, while undoubtedly affecting the value and credibility of the evidence, did not render it worthless. But when Parliament allowed plaintiffs and defendants to give evidence, it cannot be supposed that they expected a fundamental change in human nature. And the fact that glaring and obvious perjury—especially in divorce cases—regularly goes unprosecuted, shows that the difficulties of the position are appreciated by the authorities.—*L.J.*, 1929, p. 61.

Foreign and English Bars.—The internationalising influence of the League was bound to affect in time the legal fraternities of the Nations; and negotiations and friendly interchanges have

taken place between the French and Belgian Bars on the one side and the English Bar on the other. It was in December, 1924, that the invitation to consider the formation of an international federation of Bars was first extended to the English. The invitation was, for strong reasons, regretfully declined; and the invitation was again given in 1927. The Bar Council did not act hastily; they appointed a Special Committee to investigate and report. Vaughan-Williams, K.C., crossed the Channel and attended a meeting as English "Observer." In due time he reported to the Special Committee; the Committee reported to the full Council; and on February 21, 1928, Sir Douglas Hogg replied to the Director of the International Institute of Intellectual Co-operation, Paris, declining the invitation, and, apparently, for the same reasons as before.

The inability of the Council to accept the invitation was expressed in the most friendly terms; helpful suggestions were made, and future co-operation with the Union Internationale des Avocats was regarded as a hopeful possibility. Moreover, an English "Observer" was suggested for future meetings; the objects of the Union were applauded; and Sir Douglas concluded with a reference to his respected confrere: all in the best Locarno spirit.—*L.J.*, 1929, p. 71.

Wives—An Exploded Theory.—Judge Parry has observed that the idea of the chattelhood of wives still lingers in the minds of some of our judges. This is not very surprising, for the ancient theory still lives and reigns in our law of torts and in the rules governing the assessment of damages in matrimonial causes.

The truth is, however, that such survivals of the chattel theory as exist are all, or nearly all, to the advantage of women. And as for that High Court Judge's remarks to a co-respondent, that if he had stolen the petitioner's watch instead of his wife he might have been sent to gaol, there is nothing in it. He might have spoken in the same manner to the wicked woman who had stolen another woman's husband. To the author of "The Law and the Gospel" I would suggest that the possessive idea in the Judge's mind is that contained in the Song of Solomon, when the woman asserts that the Beloved is hers and she is his.

Financially, too, the injured wife almost invariably fares better than the injured husband in divorce court assessments;

just as the woman enjoys an enormous advantage in actions for breach of promise. The practical difference is that the value of a man is put at a much higher figure than that of a woman, for the simple reason that he is worth more in the sense that he has more money, or can earn more. Wives are not chattels; and it is the man who needs protection against such of those chattel theories as still survive in our law.—*L.J.*, 1929, p. 71.

The Mediator-Judge.—The fact that lawyers would thereby be deprived of the fees which they would otherwise have earned is of course a matter of no moment; one has sadly to admit that if fees were abolished altogether the people would rejoice awhile; nor would many tears be shed if our noble profession were thereby reduced to poverty and extinction. When it was too late men would discover (alas!) how essential are legal men to the well-being and good governance of England. Yet it would undoubtedly be good for the profession and good for everyone if court-fees and other legal costs were reduced.

But if men are to have their law for nothing this idea of the mediator-judge is surely no solution; one man as mediator and another as judge, perhaps, but not two-in-one. For what is the position as indicated by Sir Edward? The judge-mediator has heard the parties, and, of course, formed an opinion of the merits. If the parties fail to agree, they come before him in his capacity as judge, his mind affected, and his judicial quality impaired, by what has already occurred during the conversations. It will never do.—*L.J.*, 1929, p. 89.

Why Lawyers Fail in Parliament.—I have discovered at last the reason why so many lawyers are comparative failures in the House of Commons, and why in State affairs all barristers are vain. It is a hard saying for M.P.'s, but they must take it with such fortitude and incredulity as they may deem expedient.

Mr. Archer Polson, of Lincoln's Inn, said it in a book published in 1858. It is not to be denied, said he, that the habits of forensic oratory do not qualify, or rather do in some degree disqualify, an individual for success in Parliament. Wit and humour, so foreign to the severe reasonings and close deductions to which the lawyer habituates himself, are the prime elements of success in the House of Commons. And he refers to Sheridan's alleged observation that, before he had been many days

in the House, he discovered that three-fourths of the members were fools, and all loved a joke. So he determined not to shock them with too much severity of argument and to amuse them by a sufficient quantity of humour.

Mr. Polson, of course, when he referred to lawyers, may have been thinking only of the hirsute intellectuals of Lincoln's Inn. Otherwise it was a severe blow for the House to be told, in effect, that their mental quality was inferior to that of a jury at the Old Bailey, or even a common jury in the High Court.—*L.J.*, 1929, p. 89.

U. S. Judge Expelled.—Carlos Hardy, one of the two Judges of the Los Angeles Criminal Court, has been expelled by the American Bar Association for accepting 500*l*. from Sister Aimee McPherson for legal advice when she was in difficulties over her kidnapping case.

While declining to reveal all the facts in the case, the Association's Executive Committee decided that he violated the canons of the Association, which prohibit the acceptance of pecuniary or other obligations from those whose interests are likely to be submitted to him for judgment.

This is the first time that the Bar Association has taken disciplinary action of this kind. It followed a complaint from the California Bar Association, which found that it lacked jurisdiction to penalise the Judge, who contends that the unsolicited fee represented legal advice he had given Sister McPherson before she was accused of a conspiracy to defeat justice.—*L.J.*, 1929, p. 95.

Jurists to Meet at Geneva.—In order to prepare the way for a World Conference on the Codification of International Law under League auspices, a special committee of jurists met on January 28 at Geneva.

Sir Cecil Hurst, the senior legal adviser to the Foreign Office, represents Great Britain on this committee, whose first business will be to examine and collate the replies of some twenty or more Governments to a questionnaire recently addressed to them. The points covered by the replies include:—

(1) Nationality;

(2) Territorial Waters; and

(3) The Responsibility of a State for damage caused on its territory to foreign life and property.

The differences between the British, Continental and American standpoints are very considerable (says *The Daily Telegraph*) as regards both 1 and 2. Hence the difficult cases which occasionally arise in connection with persons possessing two or three nationalities, or, on the other hand, no nationality at all. Similarly, while British maritime law limits the extent of territorial waters to three miles, other Powers claim jurisdiction over a distance of six or even twelve miles from their shores.

The consideration of the third problem mentioned above was prompted originally by the Corfu incident of 1923, which followed on the murder by brigands of an Italian General on the Albano-Greek frontier,—*L.J.*, 1929, p. 95.

The New Lord of Appeal.—The Appellate Jurisdiction Act, 1929, which provides for the appointment of an additional Lord of Appeal, received the Royal Assent on Tuesday, and the appointment of Mr. Justice Tomlin to fill the office was immediately announced. As though to give Sir Thomas a happy start in his passage to the highest Court, his appointment was one of the first papers signed by the King since the commencement of his illness. But that is only a coincidence, though a happy one. More important it is that the appointment will be warmly approved by the profession. It had been considered as likely, but there were other Judges, senior to Sir Thomas—who has been a Judge only since 1923—and eminently fitted for the work of Final Appeal, who might well have been selected, and the appointment was by no means a foregone conclusion. The promotion of a Judge of first instance to the House of Lords, without taking the Court of Appeal on his way, is unusual, though not unprecedented. It happened half a century ago in the case of Lord Blackburn, and a more recent instance is that of Lord Parker, who went from the Chancery Division to the House of Lords in 1913, and who did distinguished judicial work there and in the Privy Council during the war. The loss occasioned by his unexpected death is not yet forgotten. A more signal instance of promotion was that of Lord Macnaghten, who went straight from the Bar to the House of Lords. Mr. Justice Tomlin has shown himself as a Judge clear and firm, but withal courteous and kindly; and the Chancery Bar will only be consoled for his loss by the knowledge that the appoint-

ment, by sending Sir Thomas Tomlin to join Lord Blanesburgh, doubles the Equity side in the House of Lords.—*L.J.*, 1929, p. 97.

Labour and the Lord Chancellorship.—In last week's issue of *Britannia*, Lord Birkenhead writes on "The Labour Party and its Leaders." So far as such an article deals, as does this one, with the general leadership of the Labour Party, it is inappropriate for comment in such an organ as *The Law Journal;* but the possible advent of a Labour Government in the near future, as the result of the coming General Election, makes it inevitable that the difficulties which would face a Labour Prime Minister in finding a Lord Chancellor should be the subject of consideration among the profession. In 1923 Mr. Ramsay MacDonald was so fortunate as to have Lord Haldane available, and his appointment solved what must otherwise have been a serious difficulty. Lord Haldane has gone; and the choice of a Labour Lord Chancellor will be a problem not easy of solution. Lord Birkenhead is blunt about it:

"And what is Mr. Ramsay MacDonald likely to do (what, indeed, will he be compelled to do) in order to strengthen his well-disciplined, but very senile team in the House of Lords? He must find a Lord Chancellor. No lawyer known to me who is at this moment an avowed member of the Labour Party could be appointed to the Woolsack without something approaching a public scandal. Possibly the precedent—a very fortunate one—adopted by the late Labour Government when they appointed Mr. Macmillan to be Scottish Law Advocate without political responsibility might be repeated."

In such a case, the appointment of a judge such as Mr. Justice Sankey or one of the very able judges of the Court of Appeal would not, in my opinion, affront either the legal profession or the community as a whole.

Lord Birkenhead has overlooked the fact that Sir John Sankey has been, for exactly a year, a member of the Court of Appeal; but that is by the way. He goes on to suggest that a Labour Premier should make a "non-party" arrangement with his opponents, which would secure the opportunity to the Government of the day of nominating Lords of Parliament for a limited period." Presumably, a non-political Chancellor would be one of these.—*L.J.*, 1929, p. 97.

A Non-Political Chancellor.—We confess to some surprise at finding that Lord Birkenhead apparently regards the appointment of Mr. Macmillan to the Lord Advocate without political responsibility as a "precedent" which only needs applying to the Lord Chancellorship; the two offices do not appear to us to be in *pari materia* at all. And, with great respect to Lord Birkenhead, he does not seem to have envisaged the inevitable results of his suggestion. The Lord Advocate has never been a member of the Cabinet; the Lord Chancellor is one of its most important members. A Lord Chancellor "without political responsibility" could hardly be a member of the Cabinet; for the members of the Cabinet have a joint responsibility for the policy and proposals of the Government, and must support them in Parliament. With a Chancellor who was not a member of the Cabinet, it would be necessary that the political side of the functions now discharged by the Lord Chancellor of the day should be placed either upon the Attorney-General or upon a Cabinet Minister who would, in effect, be a Minister of Justice; and since a Labour Government could naturally not be expected to accept the position that an *ad hoc* arrangement of this kind was to be made whenever they came into power, the almost inevitable result would be, in our view, that the Lord Chancellorship would be shorn of the political side of its functions. It may be that this is a necessary result of the re-orientation of political parties; but it is a change which we should see with regret, and it would be a pity if it came about by attempting to treat an appointment to what can well be treated as a non-political office, as a precedent for an appointment to what has always been an important political post.—*L J.*, 1929, p. 98.

Extra-Judicial Comment by County Court Judges.—Of the *lachrymæ rerum*, judges, both of the High Court and of the lesser tribunals, must frequently, we imagine, become very conscious; and, since it is all to the good that our senses, too, should relapse at times into "cutting remembrances," that our "sorrows, should be kept raw by the edge of repetitions"—extra-judicial comment designed to focus public attention, or to combat the natural inertia of the public conscience, is not only permissible but desirable. But such comment is valuable only in so far as it is the result of an expert diagnosis and of a right gauging of the trend of the "time-spirit." Where it resolves itself into platitudinal criticism by judges entirely unable to "digest the

mixture of our few and evil days," then it had far better be unsaid. And in this latter kind of comment, it seems to us, there is a lementable and increasing tendency on the part of certain County Court judges to indulge. True, the indulgence has brought them an unusual meed of notice in the daily press. But publicity is accorded the remarks—we are afraid—not because of their acute philosophic import but because of their journalistic value as "copy". They are, indeed, regarded rather as in the nature of public entertainment. And publicity obtained on such grounds is calculated to damage the prestige not only of the particular judges in question, but of the County Court Bench as a whole.—*L.J.*, 1929, p. 99.

Complications of Citizenship.—Three jurists, including Sir Cecil Hurst (Great Britain), out of the five appointed to study the replies received by the Secretary-General of the League of Nations from twenty-seven Governments on questions of international law relating to nationality, territorial waters, etc., have (says *The Daily Telegraph*) finished their first week's work. The other two jurists are still absent, one being ill, and the other unable to leave his country at present.

These jurists hold their meetings in private, and are still engaged in their study of the replies from the various Governments on the question of nationality, some of which are lengthy documents, although the Italian Government is said to have dealt very summarily with the League questionnaires submitted to it.

The British Government, after referring to its naturalisation laws, mentions, concerning the adoption of children by British persons, the new legislation, which came into force in Great Britain in 1926, stipulating that an adopted child should be a British subject.

His Majesty's Government points out the desirability of uniformity in the nationality legislation of the different countries as regards the effect of marriage upon a woman's nationality. As things are at present, it can happen that a British woman who marries a foreigner, and, according to British law, thereby loses British nationality, can be deprived of any nationality if the national law of her husband does not confer her husband's nationality upon her.

On the other hand, a British woman who marries a foreigner, and consequently loses British nationality, can, on being left

a widow, or in case of divorce, regain her British nationality by applying to the Home Secretary, and without the necessity of fulfilling the usual period of residence in Great Britain prescribed for ordinary cases of naturalisation.—*L.J.*, 1929, p. 116.

The New Chancery Judge.—The vacancy on the Bench of the Chancery Division due to the translation of Mr. Justice Tomlin to the House of Lords has been filled by the appointment of Mr. Fairfax Luxmoore. The appointment had been generally anticipated; it is very popular with the Equity Bar; and will, we have no doubt, prove successful. Mr. Luxmoore, who was called to the Bar in 1899, rapidly acquired a large practice and comparatively soon after taking silk in 1919 he joined the select band of "specials". He has had a steadily growing reputation, especially in witness actions, and his wide experience and—may we add—genial manner which has endeared him to a host of friends will make him a valued addition to the Bench. The biographer of Lord Bowen speaks of "the transition from the excitement of advocacy and from the participation in a succession of important and interesting cases to the uneventful tranquility of the Bench" as producing a painful reaction. It may be so, though we have not noticed that newly—made judges show any sign of it; and there are judges—we gather that Mr. Justice Luxmoore is one—to whom additional facilities for golf may not be unattractive.—*L.J.*, 1929, p. 117.

The Monroe Doctrine.—Two very interesting articles on the Monroe Doctrine by Prof. S. de Madariaga, which appeared in *The Times* of the 6th and 7th instant, lead up to the conclusion that its practical result at the present time is to instil in the South American States a fear of the hegemony of the United States. The situation for which the doctrine was devised—the protection of America from European interference—has been reversed. "Born to errect the United States as a bulwark in defence of the American nations against Europe, it has evolved so as to drive American nations to seek in Europe a bulwark against the United States." Possibly this is true, for the doctrine is not static, true, yesterday, to-day and forever; it is, like all things outside Tennessee, evolutionary, and has passed and is passing through successive stages. Dr. Louis M. Sears, whose *History of American Foreign Relations* was reviewed in

our columns last year (66 L J., p. 175), describes it as the one ingredient in American foreign policy which every citizen knows by name, though few define it alike. According to Prof. Madariaga, the citizen is content to leave its working to the Administration, with the result in "parody of the English dictum that the liberty of the subject has dwindled down from precedent to precedent, that the scope of the Monroe Doctrine has broadened out from President to President." Knowledge of the doctrine may be as inexact here as in America, but its origin and effect have been well stated by Mr. Wyndham A. Bewes in a paper, *The Monroe Doctrine and Entangling Alliances*, read before the Grotius Society in 1927 and published in last year's volume—Vol. 13 of the Transactions of the Society. The doctrine itself finds a place in Art. 21 of the Covenant of the League of Nations as the leading example of a "regional understanding for securing the maintenance of peace," the validity of which is not to be affected by the Covenant. Perhaps, having regard to the numerous infringements of its original purpose since its enunciation by President Monroe in 1823, the draftsmen of the Covenant would have been as much puzzled as anyone else to state its present scope. But whatever may be the truth of Prof. Madariaga's thesis that South America now sees in it only a mark of the predominance of the United States, for people in general it may be still paraphrased as "America for the Americans."—*L.J.*, 1929, p. 118.

L.J. and L.C.J.—Now that Scrutton, L.J., has declared, *obiter*, that there is such a thing as judicial, as distinguished from other forms of legal humour, and that all the occupants of the Bench indulge in it at times, all of the Bar who were dubious must doubt no more. It is improbable, however, that the L.C.J. will give unqualified assent to this *obiter dictum* of the Court of Appeal, especially that part of it which ascribes to all the judges this humane and humorous indulgence.

Yet the L.J. on this very occasion essayed to give an example of his meaning. The appeal in *Hobbs* v. *Tinling and Co.*, was based largely on comments alleged to have been made by the L.C.J. during the trial, and Birkett, K.C., was engaged in the argument of complete justification. "I have in mind," said the L.J., "the well-known authority which says that it is as important that justice should seem to be done as that, in fact, it should be done." Gentle reader, who was that well-known

authority? We know that if he was not the original author, the L.C.J. adopted that saying with universal approval.—*L.J.*, 1929, p. 128.

Legal Maxims.—The theory that the King can do no wrong has played an important and often beneficial part in the development of our Constitution; there is about it a brevity, a dogmatic and picturesque simplicity, which appeals to the vast multitude who only read while they run. "Hearsay is not evidence"; "A man is innocent until he is proved to be guilty," are others of the great company of simple legal sayings for the man in the street, like so many other saws, they are, of course, very inaccurate and misleading; subject to a multitude of distinctions, exceptions, qualifications and explanations. But they convey an idea which is true in the main, and therein they compare most favourably with many clauses of the Local Government Bill and other modern enactments, with their accompanying Statutory Regulations and the explanations so frequently appertaining thereto.—*L.J.*, 1929, p. 146.

And their Abuse.—Now, partly from the theory that the King can do no wrong, a mass of Crown practice and procedure has accumulated; vexatious, unnecessary, and annoying to His Majesty's liege subjects, and sometimes operating against them with great harshness and injustice.

This has been recognised by all authorities outside the Government Departments, and by many of the ablest of those within. The merchants feel strongly on the matter, as of course; and the Bar Council and the Council of the Law Society are unanimously in favour of reform. A council of the Judges has not been called to deal with the matter; and I respectfully ask the Lord Chancellor, Why not? For there is upon him and others a statutory obligation to summon them together once a year; and here is a topic well worthy of their best attention and upon which their opinion would greatly outweigh that misty and undefined opposition to which the Attorney-General so darkly referred when he revealed the Government's attitude towards Sir Henry Slesser's Bill. The reform is obviously inevitable; but who is the inexorable Mr. Jorkins to whose objections the Attorney-General and the Government attach so much importance?—*L.J.*, 1929, p. 146.

The Vindication of Mr. Josling.—Another matter, suggested by the famous legal maxim, is this matter of the vindication of Sergeant Josling, who was ordered to resign in 1922 because he had brought "false charges" of corruption in the police involving charges against ex-Station Sergeant Goddard. Recent revelations made it clear that on the vital matter Sergeant Josling was right and the Home Office was wrong. And now the Home Office, viewing the matter in the light of subsequent events, has declared to Mr. Josling that "it is clear to the Home Secretary that your being required to resign should not be regarded as implying any reflection upon your personal character."

This confession—for such it indubitably is—of the Home Office is an event of tremendous significance and importance, and reflects great credit on Sir William Jaynson Hicks. For the Home Office was under no legal obligation to make amends. And in every Government Department there is, or has hitherto been, a fixed idea that in its official capacity, in the legal or in any other sense, a Government Department can do no wrong; and it would take something much more cogent and coercive than the light of subsequent events to bring it, even thus proudly, to the Confessional.—*L.J.*, 1929, p. 146.

Infallibility and Justice.—Yet this historic document, this momentous precedent, revealing a Government Department in the very act of climbing down, is not wholly free from defect and deformity. How could it be? For my part, I cannot blame the Department for trying to cover itself with a wretched rag of righteousness when, with total irrelevance, it reminds Mr. Josling of his observation at the conclusion of the proceedings which led to his enforced retirement: "All I can say is that I express my sincere regret for my impetuous action and for the trouble I have caused. That is all I can say."

An absence of impetuosity on the part of the Home Office will, in the circumstances, be forgiven. We in the Law are accustomed to appeals and reverses; we hear the citizen from time to time make a full and ample apology in Court. But in the Army, Navy, Police and Civil Service this sort of thing does not occur. It is bad form; it is not done. Therefore it is a great thing that one of the oldest, and perhaps the most important of the Government Departments, holding the doctrine of its own infallibility, has yet indicated to Mr. Josling

(in the light of subsequent events) that a mistake was made; and has acted accordingly.—*L.J.*, 1929, p. 146.

Delay in Indian Appeals.—Delivering the opinion of the Judicial Committee of the Privy Council on February 15, in an appeal from Madras, Lord Atkin said that the judgment of the High Court was given in 11 suits of ejectment brought by the respondents against the respective appellants. Seven out of the 11 suits were instituted in 1913, and the only question so far decided and the only question before the Board was whether the Civil Court in which the actions were brought had jurisdiction and not, as the appellants contended, the Revenue Courts. The determination of that question had required recourse on seven different occasions to the Courts and had occupied nine years in Madras. The case had taken six years more to reach the Board. Their Lordships deplored that delay, which was obviously much greater than was necessary, and reached the borders of a scandal. They did not, however, propose to recapitulate the various stages in which the case toiled to and fro between the Lower Courts and the High Court, or to apportion blame.—*The Times.*—*L.J.*, 1929, p. 151.

Charges against a New York Judge.—The Judiciary Committee of the House of Representatives has decided (says *The Times*) to transmit to the Attorney-General for investigation charges brought recently in the House by Mr. Fiorello La Guardia, of New York, against Mr. Francis J. Winslow, a Judge of the Federal District Court of New York. Pending the outcome of the investigation, Mr. Winslow has asked to be relieved of duty.

The charges against Mr. Winslow were contained in a resolution which accused him of nepotism and favouritism in awarding receiverships in bankruptcy, intimidation of witnesses, harassing lawyers, and other acts, which, it was alleged, had given rise to a "general rumour and impression among members of the Bar and public of unjudicial, unfair and improper conduct on the part of the said Judge Winslow." These charges are largely an outcome of alleged scandals in connection with the mismanagement of estates in bankruptcy in the New York Federal District. The resolution moved by Mr. La Guardia asked the Judiciary Committee to investigate Mr. Winslow's fitness for office and report its findings, together with recom-

mendations for exoneration, condemnation or impeachment.—*L.J.*, 1929, p. 151.

CONTEMPORARY LEGAL LITERATURE.

The Harwad Law Review for November, 1928, contains a very instructive article by Mr. Percy H. Winfield on "Public Policy in the English Common Law." His main quest is to see if the English Judges recognise any ideal standard of judicial legislation in tackling new questions arising before them uncovered by statute or case-law.

When Law was in the making, Public Policy, under different names and sometimes under the veil of anonymity, played an important part and pervaded the whole legal system. Whenever a rule of law was felt to be harsh or defective, equity modified it and even long before equity became a separate system, the ideas which lie at the root of it were put in practice by the King's Courts, *e.g.*, writs being adapted by means of fictions to meet new cases. In the 14th, 15th and 16th centuries, Chancellors were mainly guided by public policy and applied it consciously as well. Reason had then its sway and neither statute nor custom could then prevail against the law of reason.

Judicial authority treats Bracton as the source of the doctrine. But we get a glimpse of it in Littleton when he gives it as a ground of any particular rule which he states that the adoption of the contrary principle would be "inconvenient" or "against reason." This theory of "inconvenience" or "unreasonableness" was developed by Coke into something more technical and more far-reaching when he stated and emphasised the maxim "*nihil quod est inconveniens est licitum*" which means that it is better that one individual should suffer rather than many be prejudiced. This maxim contained the seeds of the later formal ideas about public policy. Sir Henry Finch, a contemporary of Coke, calls it the "common weal" and Shepherd in his Touchstone refers to certain matters as "being against public good." Lord Chief Baron Pollock equates this to Coke's "repugnant to the State." In the 17th and 18th centuries, the Courts were advancing by somewhat uncertain steps to a narrower application of the doctrine though not to a more definite conception of it. With the development of statutes and case-law, the scope for the free play of reason, convenience and policy became reduced, but even then in the guise of interpreting the old law, old cases were (and are being) read in the light of current no-

tions. Every new decision formed an outpost for further exploration and with the swelling of the statutes and the increase of Parliament's powers with the Revolution of 1688, the doctrine fell much into the background in courts of law.

Several illustrations may be given of parts of the law where public policy has penetrated, *e.g.*, contracts in restraint of trade; rule against perpetuities; rules against sales of offices, marriage contracts and wagers. In the early 19th century the tendency grew of limiting the application of the doctrine of public policy, as it was felt that it would put Judges in a position which Parliament alone could occupy or infect with a virus of uncertainty principles which had long been settled by case-law. Lord Mansfield in *Jones* v. *Randall*[1] indicated that public policy ought to be confined to new cases but the law of nature did not thereby cease to function in Lord Mansfield's time. The history of the Law Merchant, recognition of quasi-contractual liability, notions of the "reasonable man" and a "reasonable price" are all instances of its influence under another name. There have been different views about public policy among the Judges and even by the same Judge on different occasions. Some like Best, C.J. and Burrough, J., felt that courts had gone farther than was warranted and that where such questions were doubtful they ought to be left to the legislature; while others like Abbott, C.J., carried it a step further than before. In 1853 its very life was threatened when 16 Judges fought a pitched battle about it in *Egerton* v. *Brownlow*.[2] In that case, one extreme view would have public policy reduced to a mere guide for ascertaining the object of any particular law, another would have it exalted into an abstract standard of judicial legislation and a *via media* view which verged towards one or other of these extremes. Lord Chief Baron Pollock, whose view proved acceptable to the House of Lords, said that Courts ought not to shrink from applying the doctrine to "any new and extraordinary case that may arise." "All matters relating to public welfare must be decided and determined upon their own merits only. It may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it. Is it, or is it not, a part of our common law, that in a new and unprecedented case, where the mere caprice of the testator is to be weigh-

1. (1774) 1 Cowp. 17.

2. (1853) 4 H.L. Cas. 1.

ed against the public good, the public good should prevail? In my judgment it is."

The writer of the article here says: "I have read nothing in the reported judgments from *Egerton* v. *Brownlow*[2] to 1928 which departs seriously from the extracts that I have cited above from the Lord Chief Baron's judgment. I respectfully think that it represents what English Law always has been and still is." The writer refers to Mr. Knight's view in 38 L.Q.R. 207 that *Egerton* v. *Brownlow*[2] was followed by a period of scepticism and hesitation in relation to public policy and while agreeing with him that there are some dicta raising that inference, thinks that they merely express a conservative influence. He sums up as follows:—

(1) The attitude of the Bench in general towards public policy is one of cautious acceptance of it. The Judges have often repeated Mr. Justice Burrough's metaphor that it is an "unruly horse" and some have even felt it to be a tiger and refused to mount it at all. It is generally felt to be a very unstable and dangerous foundation to build upon.

(2) Public policy is indefinable. The writer describes it as " a principle of judicial legislation or interpretation founded on the current needs of the community." This definition signifies that the interests of the whole public must be taken into account whereas in many cases what seems to be in contemplation is the interest of one section only of the public. For example, contracts in restraint of trade. The explanation suggested by the writer for this paradox is that the Courts must certainly weigh the interests of the whole community as well as of a considerable section of it, such as traders, and that in those rules there will not be found anything prejudicial to the Nation as a whole.

(3) Public policy is necessarily variable varying with the time, the topic and *the person applying it* (the italics are ours). It is its chief characteristic and its chief virtue. In *Rodrigues* v. *Speyer Bros.*[3] Viscount Haldane has analysed the influence of public policy very carefully. The writer summarises the Viscount's conclusions as follows: "(*a*) Rules which, though originally based on public policy have become so crystallized that only a statute can alter them, for example, the rule against perpetuities; (*b*) cases in which public policy has never crystallized, in which public policy depends on no real legal principle,

2. (1853) 4 H. L. Cas. 1.

3. (1919) A.C. 59.

in which it is accepted as a matter of fact, and in which its application depends on the circumstances of each particular case, for example, cases concerning the legality of waters; (*c*) cases in which public policy has partially precipitated itself into legal rules which, however, have remained subject to its moulding influence in the sense of current national policy, as illustrated by covenants in restraint of trade. In this last field may be previous decisions in plenty, but they cannot be taken to stereotype national policy. Underlying all of them is the legal principle that trade must not be fettered. But what was a fetter one hundred and fifty years ago may have ceased to be so now. Under this head, Lord Haldane included also the general principle that an alien enemy cannot sue in this country. In the realm of contract, some Judges have expressed a decided disinclination to extend public policy any further in the direction of invalidating agreements."

(4) *Limits of public policy.*—It ought not to conflict with existing parliamentary legislation, though it may be usefully referred to in resolving a doubtful point in the interpretation of it. Again where a rule of common law is itself clear, arguments based upon public policy are beside the mark. Public policy is no ideal standard to which law ought to conform. It may, says the writer, answer the question "what is it that the community wants now" but it is dumb before the question "what is it that an ideal community ought to want."

A Note on "Damages for non-delivery" in the *Law Journal* of December 22, 1928, discusses the effect of the decisions in *Kasler & Cohen* v. *Slavouski*[1] and *R. & H. Hall, Ltd.* v. *W. H. Pin (Junior) & Co., Ltd.*[2] on the rule in *Hadley* v. *Baxendale.*[3] The general rule laid down in *Hadley* v. *Baxendale*[3] is embodied in Ss. 50 and 51 of the English Sale of Goods Act, 1893, and in S. 73 of the Indian Contract Act. Cases where special circumstances are expressly provided for in the contract offer no difficulty. Even when they are not so provided for, Courts may sometimes have to assess damages on the footing that knowledge of the special circumstances has to be implied, as where the plaintiff enters into the contract with a view to a sub-contract and which the defendant must be presumed to know. Lord Esher, M. R., in *Hammond* v. *Bussey*[4] extended the rule to the cases of

1. (1928) 1 K.B. 78.
2. 33 Com. Cas. 324
3. (1854) 9 Ex. 341.
4. (1887) 20 Q.B.D. 79.

sub-contracts not yet actually made at the time of the contract but which will *probably* be made or in the ordinary course of business is sure to be made. This view has been carried to its logical conclusion in *Kasler & Cohen's case*[1] where there was a string of sub-sales, four in all, and in an action for breach of warranty plaintiffs were awarded (1) damages recovered by the last buyer from the last seller, (2) the costs of both sides in that action, and (3) a sum in respect of costs incurred by all intermediate holders, including the plaintiffs, in connection with the claims made against each of them by their respective immediate purchasers. The note extracts the following dicta from *R. & H. Hall, Ltd.* v. *W. H. Pim (Junior) & Co., Ltd.*[2] which carry the matter still further:

Lord Dunedin.—"I do not think that 'probability' as the word is used in *Hammond* v. *Bussey*[4] means that the chances are all in favour of the event happening. To make a thing probable it is enough, in my view that there is an even chance of its happening."

Lord Shaw.—"I would venture to read that as a sub-contract which, in the ordinary course of business, was not unlikely to be made."

Lord Phillimore.—"Those damages which . . . . are, at the time of making the contract, recognised by the parties as those which in the particular case *may* result from the breach."

In ordinary cases of non-delivery, etc., the writer points out that this harshness is mitigated by the other qualification to the above rule, *viz.*, that the plaintiff must take all reasonable steps to mitigate the loss consequent on the breach. The decision in *Kasler & Cohen's case*[1] also qualifies it by saying that the defence to the action must be reasonable. Compare with this note the dicta of the Privy Council in *Hope Prudhomme & Co.'s case*[5] "any damages which they would have to pay to the buyers from themselves on account of the non-delivery of the cargo would be damages which they in their turn could recover as damages from the appellants" and lower down "By virtue of a clause in one of the earlier documents, and which is in conformity with the usual practice in produce markets where there is a chain of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the damages to be recovered all along the chain."

1. (1928) 1 K.B. 78
2. 33 Com Cas. 324
4. (1887) 20 Q.B.D. 79.
5 (1925) I.L.R. 49 M 1 at 7 (P.C.)

BOOK REVIEWS.

"RESTATEMENT OF THE LAW OF CONTRACTS," by The American Law Institute (Official Draft of Chapters 1—7).

It is needless to expatiate on the usefulness of a book of this kind. The introductory note by the Director shows the extreme care and attention bestowed by the American Law Institute in the preparation of this official draft. Before the final passing of the present draft by the Council of the Institute, the draft went through elaborate legislative procedure. Copies of the tentative draft are said to have been circulated widely among Judges, Lawyers and Teachers of Law and the draft with their suggestions was placed before a conference of the representatives of the Co-operating Committees of the State Bar Associations in Chicago, at which 87 persons appear to have been present besides the officers of the Institute, several members of the Council and all the reporters. It was then placed before the Council for discussion and the result of all that labour is the present official draft. In form, it is like Mr. Edward Jenks' Digest of English Civil Law divided into sections with illustrative commentaries attached to each, but being only a restatement of the law, it does not refer to the leading cases as Mr. Jenks' Digest does. Where the law is uncertain, the draft appears to state what it considers to be the better view, *e.g.*, S. 39 (Appendix, p. 230), S. 45 (p. 233), S. 65, S. 166 (p. 274). The Appendix attached to the book and prepared by the Reporter for contracts contains some useful explanatory notes (with cases) on select sections and also gives the reasons for the statements wherever there is a conflict of authority. The unfamiliarity with the technique of the American Law and the difficulty in ascertaining the exact law on a point has often been responsible for the Judges in India and England deprecating references to the American authorities. It may be hoped that this "Restatement" will go a long way to help the profession in ascertaining the American Law. It is very much to be wished that the Institute will complete the Restatement of the Law of Contracts and give us a similar "Restatement" in other branches of law as well. With the rapid march of civilization, new questions not contemplated by the framers of the Indian Codes come up for decision and much useful aid can be derived from foreign systems of law. The get up of the book leaves nothing to be desired.

It may not be out of place here to express a hope that this example may be followed in India and similar "Restatements" of Indian Law attempted.

THE TRIAL OF J. BLOMFIELD RUSH. Edited by W. Teignmouth Shore. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

This is one of the few cases where the prisoner defended himself without a counsel. The story of the daring murders of a father and son, Mr. Jermy and Mr. Jermy Jermy and the attempt at murder of Mrs. Jermy Jermy and a servant woman, all on a single night by the same person J. Blomfield Rush, as told in the introduction to this volume, makes one's blood curdle. The evidence for the prosecution being complete and for the defence comparatively insignificant there was hardly room for the Judge Baron Rolfe to incline otherwise than to a conviction of the prisoner to death by hanging. The defence examination and cross-examination, being handicapped by the lack of a professional adept, led naturally to many defects and to the consequent unfavourable impression on the Jury. But the case for the prosecution was strong enough to create every circumstance against the prisoner. The conduct and behaviour of the culprit through the rest of the days in prison after sentence strikes us as an unique instance where the mind was unchanged even in the face of death. Such is the abnormal mentality of Rush providing the student of psychology much substance for curiosity.—*K.C.*

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THE RECORDING AND THE DECREEING OF COMPROMISE PETITIONS.

Where a suit has been adjusted by any lawful compromise, O. 23, R. 3, C. P. Code, enacts that "the Court shall order such compromise to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit"; that is, the entire compromise has to be recorded, but only so much of it as relates to the suit is to be decreed. Only the decreed portion, as distinguished from the recorded portion, will be executable in the suit. According to the Privy Council in *Hemanta Kumari Debi* v. *Midnapur Zemindari Company*,[1] "A perfectly proper and effectual method of carrying out the terms of O. 23, R. 3, C. P. Code, would be for the decree to recite the whole of the agreement, and then to conclude with an order relative to that part which was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement." In passing, it may be observed that, for convenience sake, the entire compromise is usually appended as a schedule to the decree, instead of being recited in the body of the decree.

The expression "relates to the suit" means "relates to the matters in question in the suit" as contrasted from those not so in question. But in settling the suit-claim, the parties are at liberty to agree upon any relief, though the relief may be different in kind from that claimed in the plaint; and the agreed relief may be decreed by the Court. For instance, a compromise decree in a suit on a promissory note by which the agreed

1 (1919) I.L.R. 47 C. 485: 37 M.L.J. 525 (P.C.).

amount is *charged* upon property, is quite valid; that is because the relief by way of charge relates to the suit or "the matter of the claim in the case". The decision in *Joti Kuruvetappa* v. *Isari Sirusappa*[1] is only that, and nothing more. The case in *Sabapathi* v. *Vannamahalingam*[2] marks a further step. It lays down that where a compromise goes beyond the subject-matter of the suit and contains other conditions relating to extraneous matters of dispute, if those conditions are to any extent the consideration or the moving force for the compromise of the subject-matter of the suit, they must all be *decreed* as relating to the suit. The fact that the extraneous conditions admit of easy segregation is no bar to their being decreed in the suit. Presumably, all the terms of a compromise are inter-dependent, and agreed upon as a whole and on the whole. The case in *Ramaswami Naidu* v. *Subbaraya Tevar*[4] goes still further; it explains away the cautious obiter expressed by the Privy Council in *Hemanta Kumari Debi* v. *Midnapur Zemindari Company*[1] cited above. The broad theory that it sanctions is this: Where it would not be easy to segregate the terms of a compromise relating to the matters in question in the suit, from those not so in question, *i.e.*, where they are blended in one indiscriminate and indivisible whole, the entire provisions of the compromise are to be decreed as relating to the suit. In that case, a suit *X* was compromised on terms affecting two other suits *Y* and *Z*, and involving their dismissal. In quit of all claims in the three suits, there was a compromise decree in suit *X*, by which the plaintiff was granted twice the amount claimed by his plaint in that suit. Of course, it could not be guessed how much of the agreed amount was properly referable to the claim in suit *X*, and how much of it was properly referable to the claims in the two other suits; but despite that uncertainty, the entire amount agreed upon by the parties was decreed and allowed to be executed in suit *X*. In *Dooly Chand Srimali* v. *Mohan Lal Srimali*[5] the Court refused to record the compromise of a suit on the ground that the compromise included provisions affecting the rights and liabilities of two persons (one of them a minor) who were not parties to the suit. (See also *Ram Protap Chamria* v. *Durga Prasad Chamria*[6]).

1. (1919) I.L.R. 47 C. 485: 37 M.L.J. 525 (P.C.).
2. (1907) I L.R. 30 M. 478: 16 M.L.J. 354.
3. (1914) I.L.R. 38 M 959: 26 M.L.J. 331.
4. (1925) 49 M.L.J. 490.
5. (1923) I.L.R. 51 C. 432.
6. (1925) L.R. 53 I.A. 1: I.L.R. 53 C. 258: 49 M.L.J. 812 (P.C.).

As the law stands in Madras, it would be a permissible device of draftsmanship for the parties to a compromise petition to state therein that all the terms of the compromise, however extraneous to the suit, are to be decreed in the suit, so as to be executable in the suit. And in execution at all events, a compromise decree cannot be impeached on the ground that it is in excess of the suit. (*The Manager of Sri Meenakshi Devastanam, Madura* v. *Abdul Kasim Sahib*[7] followed in *Sarvarayudu* v. *Venkatarajù*[8] and *Ramaswami Naidu* v. *Subbaraya Tevar*[4]). Where during the pendency of a suit, the parties compromise the subject-matter of the suit along with other points of dispute, it is not unreasonable to assume that every other term of the compromise is a consideration for every other term, that the parties agree to it only on the whole and as a whole, and that they intend that all the terms of the compromise should be decreed in the suit so as to be executable in the suit without further ado. As per the view current in Madras, there is no obstacle to the fulfilment of that intention of the parties; for, the words "so far as it relates to the suit" in O. 23, R. 3 have received the most benignant interpretation.

Even on the most benignant view, one instance may be given where the Court would give strict literal effect to the above statutory words. Where a term of the compromise petition filed in suit *A* relates to another pending suit *X*, the term need only be recorded but not decreed in suit *A*, when it can be more properly decreed and ordered in suit *X*. Lastly, if the compromise of a suit be a mere device to secure an extraneous advantage to the parties by defeating the stamp law or the registration law, the Court would hold the compromise to be unlawful as per section 23 of the Contract Act. No doubt the Privy Council have decided in *Hemanta Kumari Debi* v. *Midnapur Zemindari Company*[1] that section 17, sub-section (2) (*vi*) of the Registration Act, which provides that sub-section (1) (*b*) and (*c*) are not to apply to a decree of Court, extends to the whole of a compromise decree, and not merely to that part which is operative as a decree. Notwithstanding that decision, if under the cloak of settling a promissory note suit for Rs. 4,000, the parties file a compromise petition effecting a

1. (1919) I.L.R. 47 C. 485 · 37 M.L.J. 525 (P.C).
4. (1925) 49 M.L.J. 490.
7. (1907) I.L R. 30 M. 421: 17 M.L.J. 255.
8. (1913) I.L.R. 38 M 459 · 25 M.L.J. 617.

sale or a mortgage for Rs. 4 lacs, the Court would properly decline to record or decree the compromise.

K. C. GOPALA DESIKAN.

CRITICAL NOTE.

MABEL FERRIS *v.* EMPEROR, I.L.R. 53 Bom. 149.

This case raises an interesting point as to the nationality of a lady born in South Africa of European parents, but married before a Registrar at Johannesburg to a Muhammadan who was a native of Baroda State. After the marriage the lady lived with her husband in Baroda, but when she found that he had another wife already married, differences between them arose and she went away and lived in British Territory (in Bombay). The husband brought a charge of theft against her and a warrant under section 7 of the Indian Extradition Act was issued by the Resident of Baroda for her arrest and extradition and directed to the Chief Presidency Magistrate of Bombay. Accordingly the petitioner was arrested by the Bombay Police but she claiming herself to be a European British subject applied to the Chief Presidency Magistrate for exemption under S. 7 of the Extradition Act. The Presidency Magistrate, following the opinion of the Legal Remembrancer, held that she ceased to be a European British subject by her marriage with a native subject of Baroda and had become a subject of the Baroda State and ordered to furnish bail or surrender herself. She preferred a revision petition against this order to the High Court of Bombay. The learned Judges expressing the view that in this matter, it is the common law of England that is followed in India, held that the marriage did not change the nationality of the wife and that she retained her nationality as a European British subject and was not liable to be extradited.

It is submitted that this view of the law requires re-consideration. Assuming the common law view is that the wife does not follow the nationality of the husband, by divesting her own merely by virtue of marriage, that does not affect the present question. The decision that, in the case under review, the wife retains her nationality and does not follow that of her husband is open to two serious objections. The wife in this particular case not being born in Great Britain but being born in Johannesburg—though of European parents—cannot claim to be a European British subject under the common law, for "according to English common law, nationality depends not on descent

from English ancestors (*jus sanguinis*) but upon the place of a man's birth (*jus solii*), following the feudal principle which to a certain extent regarded all inhabitants of the soil as appendages to it" (Foote's Private International Law, 5th Ed., p. 1). Thus, under the Common Law, the European British nationality could be claimed only by being born in the soil of Great Britain. This was first modified by Statute 25 Edw. 3, c. 2 which enacted that those born of British subjects "without the legiance of the King of England" shall enjoy the benefits of British subjects so far as their inheritance is concerned. It may be noted that this related only to inheritance. It was only by 7 Anne c. 5, s. 3 that "to all intents, constructions and purposes whatsoever the privileges of a British subject were conferred on children of natural born British subjects born out of wedlock." So the petitioner being born in Johannesburg, of British parents, could claim to be a European British subject only by virtue of Statute 7 Anne c. 5, s. 3 and not under the Common Law. Therefore her nationality after marrying a person not a European British subject, but a subject of Baroda State, is governed by section 10 (1) of the Act, 1870 (33 Vic. c. 14) which says that "a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject." It may be remarked that 33 Vic. c. 14, s. 10 was only a re-enactment of a similar Act of 1844. This law was re-enacted in 1914—4 and 5 Geo. 5, c. 17, s. 10 which says that "the wife of a British subject shall be deemed to be a British subject and the wife of an alien shall be deemed to be an alien: Provided that when a man ceases during the continuance of his marriage to be a British subject it shall be lawful for his wife to make a declaration that she desires to retain British nationality and thereupon she shall be deemed to be a British subject." This was repeated in the Amending Acts of 1918 [8 and 9 Geo. 5, c. 38, s. 2 (5)] and of 1922 (12 and 13 Geo. 5, c. 44) cited as the British Nationality and Status of Aliens Acts—1914 to 1922. *Vide* Foote's International Law, 5th Ed. of 1925, p. 6.

Secondly, as the marriage is with a lady who is a European British subject it must be deemed to have been celebrated under section 1 of the Foreign Marriages Act of 1892 (55 and 56 Vic. c. 23) which says that "All marriages between parties of whom one at least is a British subject solemnised in the manner in this Act provided in any foreign country or place by or before a marriage officer within the meaning of this Act shall be as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required

by law". The marriage in question was celebrated after the Parliamentary Acts of 1884, 1870, and 1914 referred to above and as there is no suggestion in the judgment under review of the wife having made a declaration of her desire to retain her British nationality at the time of her marriage, she must be deemed to have ceased to be a European British subject and to have adopted the nationality of her husband who is a subject of the Native State of Baroda.

From the above two observations it becomes evident that the rule of common law held as applicable to the facts in the judgment under review—namely, that the wife does not follow the nationality of her husband but retains her own—does not seem sound.

Another argument that was adopted in the judgment to uphold the conclusion arrived at—namely that the petitioner is a European British subject under section 4 (*i*) of the Criminal Procedure Code as amended uptodate—which says that a European British subject means "any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any colony" and "any subject of His Majesty who is the child or grandchild of any such person by legitimate descent," and that therefore in spite of the wife's marriage with a subject of the Native State of Baroda, she retains her nationality as a European British subject and that if the legislature wanted that the marriage of a European British subject with a non-British subject should divest her of her previous nationality, specific provision would have been made in the definition of the term "European British Subject". This argument ignores two considerations. Firstly, S. 4 (*i*) of the Criminal Procedure Code applies only to persons who retain the nationality of European British subject at the time of the offence. Secondly, the argument ignores the fact that the law, of the wife following husband's nationality laid down by Acts of Parliament in 1870, 1914, 1918 and 1922 referred to above, cannot be affected by the enactments of the Governor-General in Council. *Vide* S. 65 (2) of the Government of India Act.

It is possible to decide the case on a different ground and arrive at the same conclusion at which the learned Judges have arrived, with less room for comment. The fact is raised and admitted that the husband is already married and has a wife living in the Native State of Baroda. The marriage having been celebrated under the Foreign Marriages Act of 1892, with the

lady at Johannesburg by the husband during the lifetime of a lawfully wedded wife, his second marriage is invalid. By such invalid marriage the nationality of the lady remains unaffected and she continues to be still a European British subject, not liable to be extradited under section 7 of the Extradition Act.

C. UNIKANDA MENON,
Advocate.

CORRESPONDENCE.

To

THE EDITOR.

SIR,

Is allowing more than two persons (besides the driver) to sit by the side of a driver in a bus, an offence at all and is it punishable under the Motor Vehicles Act?

We have very often come across convictions for the said act and we never cared to question whether the procedure adopted was correct. A close scrutiny of the provisions of the Act and the rules leaves the matter in doubt, rather makes one incline to the view that the procedure adopted hitherto is wrong. I shall be glad to state my analysis so that the other side may be canvassed and let known for all concerned.

To preface, Section 16 is the provision that is quoted in all summonses to the accused in motor prosecutions as though it is an offence-defining section. The procedure is entirely wrong and in very strong terms, that method of action has been condemned by Justice Walsh of the Allahabad High Court.

Section 16 states the penalty for "*contraventions* of the provisions of this Act or of any rule made thereunder *if no other penalty is elsewhere provided in this Act for such contravention.*" The proviso beginning from "if no other penalty" is very important. If such a provision is made, S. 16 loses its jurisdiction over such acts and the Magistrate Court cannot take action. S. 17 relates to cognizance of *offences* by Magistrates.

The relation between the wording of Ss. 16 and 17 and the distinction they make between *a contravention of a provision* (in S. 16) and *an offence* (S. 17) deserve careful attention. Probably an offence under S. 17 may be a contravention of a provision for which no penalty is elsewhere provided in the Act.

Has the Act made any provision for penalties at all when other contraventions intervene? S. 18 gives the power to the Local Government for cancellation or suspension of licences.

It has got the power to disqualify a person from holding a licence. S. 18 (I-A) to the 'Prescribed authority' gives power to cancel or suspend any licence granted under the Act subject to conditions and limitations: so there are penalties provided in the Act. Rules will take us into details.

The "Prescribed authority" are given in Rule 1 (*d*). They are the "Registering authority" and "Licensing authority". They register, grant and cancel licences *subject to certain conditions*. What are they? Rule 30 prescribes that motor vehicles intended for hire should possess a 'G' permit. The *conditions* are given in Form G attached to the Rules. There are also *penalties* provided *for the breach of the conditions.*

The act of allowing more than two persons beside the driver goes against *Condition No.*.2 in 'G' permit—"Not more than two persons shall be allowed to sit by the side of the driver".

If broken is there any penalty? The old Condition 6 and the recent condition (amended Notification No. 546, 18th July 1928) states: "This permit may be cancelled or suspended by the District Magistrate or the Commissioner of Police for any breach of *its conditions.*" So when the Condition 2 is violated, Condition 6 gives the power to the 'Prescribed authority' to cancel the licence.

So under S. 16, when the Condition No. 6 in G. permit is a sufficient penalty to the contravention of Condition 2, how can the Magistrate take cognizance of a case under S. 16? S. 16 is restricted and limited in its scope as observed before. So "the act of carrying more than two by the side of a driver" is not an offence—it is at best a breach of a condition in G. permit which regulates the internal affairs of a bus.

Besides, G. permit represents the terms and conditions of a contract between the Licensor and the Licensee. A breach of a condition in a contract by any stretch of imagination can never be put down as an offence triable by a criminal court. If there is a breach of a condition, civil law will provide damages or a forfeiture if one or a penalty if provided in the contract itself will operate. That is Condition No. 6 in the G. permit. So in no case it is a criminal offence.

I shall be happy if this view is found acceptable to all; if not, I shall be glad to know how it is assailable.

E. S. SUNDA, B.A., B.L.,
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SUMMARY OF ENGLISH CASES.

MESSAGER *v.* BRITISH BROADCASTING CO., (1929) A.C. 151: 98 L.J.K.B. 189.

Copyright—Infringement of—Opera—Agreement containing rights of parties—Construction of—Whether assignable.

By virtue of an agreement between the composer and the authors of an opera on one side with the proprietor of a theatre on the other, a play was delivered to the proprietor who was also granted the sole and exclusive right of representing or performing the play in the United Kingdom, America, etc. The copyright was under the agreement to remain the property of the composer. But if the proprietor should fail to produce the play within a certain time in London all the rights conferred under the agreement were to revert back to the composer and authors. Proper accounts of the receipts at the theatres in which the play was to be represented had to be maintained by the proprietor and the other party to the agreement had the right to inspect them.

On the death of the proprietor, the executors of the proprietor assigned the benefit of the agreement to the respondent company without the consent of the appellants.

Held, affirming the judgment of the Court of Appeal, that on the construction of the agreement it operated as an assignment of the sole and exclusive right of representation within the area mentioned in the clause, that the other clauses also supported that interpretation. The agreement was not a bare licence or personal to the grantee, but it is one the benefit of which the proprietor or his executors could validly assign.

NASH *v.* LYNDE, (1929) A.C. 158: 98 L.J.K.B. 127.

Company—"Issue" of prospectus—Meaning of—Shares subscribed for on the faith of the prospectus—Failure to comply with S. 81, Companies (Consolidation) Act, 1908—Claim for damages.

With a view to increase the capital of the company, the managing director of the company prepared two documents, one describing the position of the company and the other stating the purpose for the increase of the capital. The two documents were signed by the other directors as well. Application forms for shares were also attached to them. One of the directors sent a copy of the documents to a solicitor to find out some among his clients who will be ready and willing to provide the capital required. The documents reached the respondent's

hands and the respondent misled by the statements contained in them subscribed for 3,000 ordinary shares in the company. No information was given to him about the capital that had already been issued otherwise than for cash and this action was brought by the respondent for damages on the ground that the two documents constituted a prospectus issued by the company and that it omitted to mention the shares which were issued otherwise than in cash.

Held, the documents were never issued to the respondent as a "prospectus" inviting him to subscribe to the shares.

Per Lord Hailsham, L.C.—It is sufficient to bring section 81 into operation to prove that the prospectus in question was shown to any person as member of the public as an invitation to that person to take some of the shares referred to therein on the terms therein set out.

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RECKITT *v.* BARNETT, PEMBROKE AND SLATER, LTD., (1929) A.C. 176: 98 L.J.K.B. 136.

Principal and Agent—Power-of-attorney—Management of principal's affairs—Power to draw cheques 'without restriction'—Cheque drawn in favour of respondent for agent's private debt—Liability of payee to refund.

The appellant while leaving for France on Red Cross work gave a power-of-attorney to one T to enable him to manage the appellant's affairs while he was in France. On the appellant's bank doubting if the power authorised T to draw cheques on appellant's account, the appellant wrote a letter to the Bank stating that he wished the power to cover the drawing of cheques upon them by T 'without restriction'. The agent for his own private debt drew a cheque on the appellant bank in favour of the respondent but signed by him as power-of-attorney agent. The respondents knew that it was drawn for his own private debt. This action was brought by the appellant to recover the amount of the cheque from the respondents (*i*) as damages for conversion, or (*ii*) alternatively for money had and received to the appellant's use.

Held, reversing the Court of Appeal, the authority to draw cheques was limited for the purpose of the power, namely, the management of the appellant's affairs and the letter could not amplify it further. The cheque being drawn in excess of his authority and the respondents being aware of it, were bound to hold the proceeds for the appellant and refund them when demanded.

John v. *Dodwell & Co.,* (1918) A.C. 563 followed.

INLAND REVENUE COMMISSIONERS *v.* FORTH CONSERVANCY BOARD, (1929) A.C. 213: 98 L.J.P.C. 34.

Income-tax—River Conservancy Board—Shipping dues—If taxable.

The Forth River Conservancy Board was assessed to income-tax on the balances of income derived by the Board by levying rates and dues on ships, etc., entering and using the river. The Board was constituted by statute for the purpose of improving the navigation of the river. The question was if the surplus of the income was not profit from or arising out of any lands, tenements, hereditaments or heritages within the meaning of Schedule A of Income-tax Act, 1918.

Held—Tolls may well arise in connection with such property as is specified in Schedule A but in the present case shipping dues and dues on passengers are not moneys arising from any property as the respondents did not own any heritable subjects apart from a portion of the foreshore purchased for possible future reclamation.

Case-law on the point reviewed.

GOSSE MILLERD, LTD. *v.* CANADIAN GOVERNMENT MERCHANT MARINE, LTD., (1929) A.C. 223: 98 L.J.K.B. 181.

Shipping—Bill of lading—Consignment of tinplates—Damaged by rain by negligent dealing with tarpalins during voyage—"Neglect in the management of the ship"—Meaning of.

The appellants consigned tinplates on board the respondent's steamship under a bill of lading. In the course of the voyage the steamship collided with a pier and damaged her stern which necessitated extensive repairs. On account of carelessness of the servants in moving and replacing the tarpalins when the repairs were being done, the hold containing the tinplates was exposed to rain which consequently damaged the tinplates. In the action for damages for the injury caused to the tinplates, it was contended that it was an act, neglect and default of the servants "in the navigation or in the management of the ship" and as such the shipowners were freed from liability.

Held, that the shipowners as carriers had failed to properly and carefully load, handle, store, carry, keep, care for and discharge the goods carried; and as such it lay on them to prove that they were protected from liability by Art. IV. The negligence in dealing with the tarpalins is not negligence in the management of the ship within the meaning of Art. IV, rule 2 (*a*) of Carriage of Goods by Sea Act, 1924.

TRANSFERRED CIVIL SERVANTS (IRELAND) COMPENSATION, *In re,* (1929) A.C. 242.

Privy Council—Rehearing—Power to overrule its own previous decision in another case—Practice in cases of rehearing the same case.

The identical question in the appeal, namely, the compensation payable to those civil servants in the service of the Crown who were transferred to the Irish Free State in 1922 and were discharged or have retired in consequence of the change of Government effected by the establishment of the Irish Free State Government, was decided on a prior occasion by the Judicial Committee in *Wigg's case* [(1927) A.C. 674]. The question arose if the Board is bound in law, and without examination, to follow that decision whether they considered it to be right or wrong.

Held, the Board would hesitate long before disturbing a decision by a previous Board which raised an identical or even a similar issue for determination; but there is no inflexible rule that the Board is, in all circumstances, bound to follow blindfold a previous decision. Petitions for rehearing of a case already decided stand on a different footing. Though there is no inherent incompetency in ordering a rehearing even, such an indulgence will be granted in very exceptional circumstances only. It is in the nature of an *extraordinarium remedium.*

CURTIS *v.* FRENCH, (1929) 1 Ch. 253: 98 L.J. Ch. 29.

Vendor and purchaser—Sale of property—Deliverable with vacant possession—Tenant in possession—Untrue statement by vendor—Purchaser misled thereby—Condition excluding compensation for misstatements in particulars—If precludes action for damages.

The plaintiff purchased a cottage at an auction sale and one of the particulars of sale stated that the property was let to a tenant who "formally and legally terminated the tenancy, but has not yet handed over vacant possession, the vendor has not pressed for possession, allowing the occupier to remain on sufferance, but the premises will be sold with vacant possession on completion." The statement that the vendor had not pressed for possession was found to be untrue and made with a view to induce intending purchasers. On completion vacant possession was not given to the plaintiff. In an action for damages for breach of the contract, the vendor pleaded in defence a clause

in the particulars that he will not be liable to compensate for errors, misstatements or omissions in the particulars afforded.

Held, the contract itself precluded the purchaser from recovering anything for the loss sustained by the misstatements. In the position which had arisen he would be entitled to rescind the contract and to recover his deposit with interest and the costs of investigating the title but nothing more.

SMITH HOGG & CO. *v.* LOUIS BAMBERGER & SONS, (1929) 1 K.B. 150.

Shipping—Charterparty—Clause to discharge cargo 'alongside' steamer—Meaning of—Custom of the Port of London—Expenses of discharge—Liability of.

By a charterparty, the plaintiffs, the proprietors of the steamship *Fernhill,* agreed to carry and deliver at Surrey Docks certain cargo, the charter providing that the cargo was to be 'brought to and taken from *alongside* the steamer at charterer's risk and expense as customary'. The customary method of discharge at Surrey Docks was as follows:—(1) As regards discharge on to the quay the shipowner was bound to discharge the timber on to the quay and stack it there. (2) As to cargo landed overside into lighters, the shipowners must deliver and stow it in lighters sent *alongside* by its receivers. The plaintiffs discharged part of the goods on to the quay and part into lighters brought to the side of the ship. The question arose as to the meaning of the term 'alongside,' it being contended for the shipowner that in case (1) his obligation ceased the moment the cargo was placed over the side of the ship on the quay, and in case (2) that his duty was merely to pass the cargo over the side of the steamer into the lighter and that any custom to the contrary was inconsistent with the terms of the contract.

Held, by *Wright, J.,* "that the cargo is alongside when it is available for release or is released from the ship's slings if discharged by the ship's tackle; and if discharged by being handed from the vessel, when it is laid with one end on the quay and the other resting against the ship". From this point the obligation of the receiver begins under the contract. As regards delivery into the lighters, the plaintiffs' duty extended till stowing the timber into lighters.

On appeal:—The obligation of the shipowners was not merely to render the cargo available for release from the steamer's tackle on to the quay but to stack the cargo on the

quay according to the custom of the port. *The Twind,* (1922) 1 A.C. 397 and *The Oresund,* 30 Com. Case 69 distinguished. The other portions of Wright, J.'s judgment affirmed.

TICKNER *v.* CLIFTON, (1929) 1 K.B. 207: 98 L.J.K.B. 69.

Landlord and Tenant—Death of tenant without paying rent for six months—New statutory tenant, a member of his family—Liability to pay arrears.

An action was brought against the defendant for recovery of the arrears of rent due by her father as statutory tenant. The defendant was a member of the deceased's family and resided with him at the time of his death.

Held, the defendant was a statutory tenant with all the rights and liabilities of a statutory tenant and on the same terms and conditions as the original agreement of tenancy. But her statutory tenancy began with her and she was not responsible for what went on before she became a statutory tenant. The arrears which the defendant's father owed to the plaintiff is not a debt owing by the defendant herself *qua* statutory tenant.

THE KING *v.* WILLIAM JONES, (1929) 1 K.B. 211: 98 L.J.K.B. 174.

Criminal Law—Felony—Conviction for—Compensation order—Order..........with reference to the person convicted—Jurisdiction of Court of Criminal Appeal—Forfeiture Act, 1870, *S.* 4 *and Criminal Appeal Act,* 1907, *S.* 21 *considered.*

On the conviction of the appellant for uttering a cheque knowing the endorsement to be forged, an order was also passed against him to pay compensation to the prosecutor to the loss sustained by him by the felony. On appeal against the order, the question was raised whether an appeal lay to the court from such order.

Held, that the order was made immediately after the conviction and had reference to the person convicted or his wife or children and was thus within the meaning of S. 4 of the Forfeiture Act, 1870 and S. 21 of the Criminal Appeal Act, 1907 and therefore an appeal lay.

WICKETT *v.* PORT OF LONDON AUTHORITY, (1929) 1 K.B. 216.

Negligence—Barge passing through the entrance lock to the dock—Owners of the Dock supplying rope—Breakage of

—*Injury caused to lighterman—Notice by the owners of the Dock exempting themselves from responsibility—Liability of owners for injury.*

The Port of London Authority had by notice put on the pierhead exempted itself from liability for any "loss, damage or injury from whatever cause arising to or by the craft or to or by any person or goods on board thereof." A lighterman having knowledge of the notice sustained injuries while navigating a barge from a dock which was owned by the authority because of the breakage of a rope supplied by the authority under whose directions and orders the navigations were to be conducted. The lighterman claimed damages for the injuries sustained by the negligence of the servants of the Port of London Authority on the ground that he, being under the orders and directions of the Authority, had no option to refuse to use the rope which he was directed to take on board.

Held, the fact that the plaintiff was compelled to regulate his vessel according to the directions of the dockmaster is in no way inconsistent with the fact "that he was in circumstances availing himself of the facilities and assistance of the servants of the Authority" and the plaintiff, having knowledge of the notice given by the defendants, exempting themselves from liability, the defendants cannot be held liable for the injuries sustained by the plaintiff.

THE KING *v.* EDMONTON INCOME-TAX COMMISSIONERS. *Ex parte* THOMPSON, (1929) 1 K.B. 200.

Revenue—Assessment to income-tax—Case stated—Whether notice in writing a condition precedent—Mandamus—Income-tax Act, 1918, *S.* 149*—Interpretation of.*

A limited company was assessed to income-tax and on its appeal to the General Commissioners being dismissed, an oral application was made to the Commissioners to state a case for the opinion of the High Court which it was alleged was agreed to by the Commissioners. No formal written notice was thereafter given to the Clerk of the Commissioners and the Clerk intimated to the solicitors of the company that the requirements of S. 149 of the Income-tax Act, 1918 *re* notice in writing, not having been complied with, the Commissioners had no power to state a case.

On the issue of a rule *nisi* to the Commissioners to show cause why a writ of mandamus should not issue directing them

to state a case, the Commissioners relied on Summary Jurisdiction Act, 1879, S. 33 and Income-tax Act, 1918, S. 149.

Held, upon the true interpretation of the above Acts, the notice in writing is a condition precedent and that not having been complied with, the Commissioners had no jurisdiction to state a case.

The dictum of Jessel, M. R. in *Taylor* v. *Taylor,* (1875) 1 Ch. D. 426 at 431 quoted with approval.

BROTHERTON *v.* J. A. JACKSON, (1929) L.J.K.B. 76.

Workmen's Compensation Act—Accident relating in death—Workman warned not to go by a certain route—Workman disobeying the warning and meeting with the accident thereby—If would disentitle him from claiming compensation—Act done for and in connection with the employer's business.

The deceased workman was employed as a sort of standby man to assist the engine driver around a navy crane (which was excavating land and putting the soil in a bucket and dropping it into trucks). During the recess interval when he had no work, the workman went to a neighbouring kiln to wash his hands. He returned to his place of business by a short cut which took him directly under the navy bucket which fell on him and killed him. The employer had specially warned him against taking that route. The employer contended that by acting against the warning, the workman acted outside the sphere of his employment and as such it was not an accident met with in the course of or arising out of the employment.

Held, the workman was doing it clearly for the purpose of and in connection with the employer's trade or business, though it may be in defiance of the employer's warning. An act may be outside the scope of one's employment if it is in breach of a specific prohibition, but the section clearly covers such cases as well and entitles the workman to compensation.

BARBER, WALKER & CO. *v.* FLINT, (1929) L.J.K.B. 83.

Workman's compensation—Agreement limiting the compensation—Change of circumstances—Allegation of—Whether application for review maintainable.

An employee sustained serious injuries in the thigh due to an accident during the course of his employment. He was paid full compensation for a time and later half the difference of his earnings between what he obtained prior to the accident and

what he received after. Later, an agreement was entered into between the employee and the employers by which it was provided that the employers "should so far as they conveniently could do find and provide at their colliery employment for Joseph Flint and pay him wages which he could earn at such employment by working part time, but not in any case, exceeding one pound". The agreement was made liable to review at the instance of either parties subject to the provisions of Sch. I, para. 16 of the Workmen's Compensation Act.

The employers sought to have a review of the agreement on the ground of fall in wages, which they contended amounted to a change of circumstances within the meaning of the agreement.

Held, confirming the award of the County Court Judge, that the mere fact that there has been a change in the general rate of wages which is a matter contemplated in the agreement itself is not such a change of circumstances as justifies the employers in breaking the agreement and obtaining a fresh award.

Per Lawrence, L.J.—The parties here have chosen by their agreement to use words which cover the fall in the rate of wages and to provide for the weekly payments which were to be made even though there is a fall of wages. Under such an agreement,............it seems to me that there has been no change of circumstances within the meaning of the authorities.

HYMAN *v.* HYMAN. HUGHES *v.* HUGHES, (1929) P. 1.

Divorce—Deed of separation—Covenant by wife not to sue for alimony or maintenance—Wife obtaining decree for dissolution of marriage—Effect on the covenant—Right to maintenance.

By a deed of separation entered into between them, a husband and wife agreed to live separate and on the husband's agreeing to pay the wife a stipulated sum during her life as for alimony and maintenance, the wife covenanted not to take any proceedings against the husband either for cohabitation or for increased alimony. Subsequently the wife obtained a decree for divorce on the ground of the husband's adultery and applied for increased maintenance. The husband pleaded the covenant as a bar and the question arose whether the covenant bound the wife after divorce.

Held by the majority (Lord Hanworth, M. R., Scrutton, Greer and Sankey, LJJ.)—The covenant in the separation deed was entered into on the basis of the facts which existed at its date, and the subsequent adultery of the husband created a

different state of facts which was not in the contemplation of the parties at the time they entered into the deed and therefore the wife was no longer bound by it. It is an incident of a suit for dissolution of marriage to make an order for maintenance and the Court will not permit parties to stop it from exercising its statutory powers as to grant of maintenance. The terms of the deed as to the sum agreed for maintenance may however be taken into consideration.

Charlesworth v. *Holt*, L. R. 9 Ex. 38 doubted.

Lawrence and Russell, JJ., dissenting.—The covenant was intended to be operative even after dissolution of marriage as it provides for its continuance after dissolution by death. The deed contains no provision that the parties should live apart in chastity, the only provision in the deed terminating the operation of the covenant being in the case of resumption of cohabitation. No provision restricting the operation of a covenant, absolute in terms, ought to be implied either on the ground that unless so restricted, the covenant might be against public policy, or on the ground that the covenant ought to be construed as being commensurate only with the period during which the husband is fulfilling the character of husband.

Any person who is competent to contract may agree to renounce the advantage of a statutory provision made solely for his or her individual benefit.

Charlesworth v. *Holt*, L.R. 9 Ex. 38 followed.

Gandy v. *Gandy*, 7 P.D. 168 approved.

Morrall v. *Morrall*, 6 P.D. 98 disapproved.

Lawrence, L.J.—No agreement between the spouses purporting to affect the rights or interests of children would bind the children or operate to prevent any application being made on their behalf to the Court to exercise its powers in their favour.

GREEN *v.* GREEN, (1929) P. 101: 98 L.J.P.D. 58.

Divorce—Child born before marriage of the divorced parents—Order for custody of the child in the petition for divorce by the wife—Child and other persons affected by legitimacy not represented in the petition—Competency of court to pass order for custody.

On a petition for dissolution of marriage presented by the wife on the ground of adultery of the husband, an order for the custody of a child born before the marriage was prayed for. It was contended for the husband that a declaration of legitimacy determines the status of parent and child and displaces

the rights of other members in the family with the resultant effects of a far-reaching character not only in respect of kinship but of hereditary and successional rights and as such cannot be decided in a proceeding in which they are not represented.

Held (*overruling the contention*):—The statutory fetter imposed upon the Court from passing an order for the custody of the child could not override the petitioner's paramount claim to the care and control of the child. The *prima facie* right of the natural mother to tend and foster her child stands on a different footing from that of the putative father, and should be protected in divorce proceedings to which the mother is a party. This relief, the High Court could grant in the exercise of the general jurisdiction in respect of infants apart from the Legitimacy Act.

THE YOUNG SID, (1929) P. 109.

Shipping—Collision—Appeal from County Court on proportions of blame—Appeal allowed—Costs if to be awarded to appellant.

In an action for damages by collision, the County Court had held both the ships were to blame but in different degrees. The Divisional Court allowed the appeal against it holding that both were equally to blame. The question arose if the appellant in the circumstances could have his costs.

Held, that in respect of the appeal, the costs of the appeal ordinarily would follow the event of the appeal and the comparative triviality of the amount involved is no consideration.

The Canton, (1928) 31Ll. L. Rep. 289 distinguished.

SHERWOOD *v.* SHERWOOD, (1929) P. 120.

Divorce—Rate of maintenance payable to wife—Disposable income of the husband—Meaning of—Proportion of husband's income, no inflexible rule.

In fixing the maintenance payable to the wife on dissolution of marriage, there is no rule fixing any proportion of the husband's disposable income, though in practice one-third is treated as a fair amount. In calculating the disposable income of the husband, the expenses of earning it must be deducted. Such expenses include his liabilities for income-tax, super-tax, and where chargeable excess profits duty, etc. Also in calculating the disposable income per year of the husband, the court must have regard not merely to the income during the year before the order for maintenance is made but also to the earnings in the previous years and the probable future income.

STATHAM, J. T. *v.* STATHAM, J. C., (1929) P. 131.

Divorce—Charge of sodomy with wife—Wife consenting party thereto—Wife an accomplice—Corroboration necessary—Sexual malpractices if by itself legal cruelty—Condonation, not pleaded—If court can take notice of.

The wife petitioned for divorce on the ground of (*i*) sodomy alleged to have been committed on her by the husband, and (*ii*) legal cruelty consisting of improper sexual practices and ill temper, abuse and the like. In proof of sodomy there was only the wife's evidence against the husband's denial. In summing up to the jury, the Judge did not warn them against acting on the uncorroborated evidence of the wife, who being a consenting party thereto was more in the position of an accomplice.

Held:—Cogent evidence is required to overcome the presumption of innocence where such a charge is made. The same principles apply in divorce proceedings as in a criminal court in deciding such heinous charges. The Judge ought to have warned the jury against finding on the uncorroborated testimony of the wife. Further the wife by subsequently living with the husband amicably condoned the offence and though it was not pleaded by the husband, the court ought to take notice of it.

JOTTINGS AND CUTTINGS.

My Lord.—A correspondent reminds me, on the subject of the proper way to address judges, that the matter has not always been free from doubt in our own country. In the early days of the present century there were complaints as to the slipshod way in which a practice had grown up of addressing chairmen and deputy-chairmen of metropolitan sessions and minor judicial dignitaries with as much pomp as Judges of the High Court, the Court of Appeal and the House of Lords; and it was suggested that the Attorney-General, the Lord Chamberlain, the Bar Council or some other infallible authority should make a pronouncement on the subject.

In former days the description "my lord" was confined strictly to the Lord Chancellor, the three "Chiefs" and the puisne judges of the King's Bench, Common Pleas and Exchequer. Even the Vice-Chancellors were at first nothing more than "your honour." Indeed, there were some authorities who maintained that, when sitting *in banco*, a High Court Judge was not "my lord." It is recorded that Serjeant Williams, "the renowned Serjeant," grandfather of Vaughan-Williams, L.J.,

when interrupted in the course of his argument by a puisne judge, would say: "Sir, I will answer your observations when I have replied to my lord."—*L.J.*, 1929, p. 185.

Buying a Mastership.—In these pure and high-minded days it is hard to believe that there ever was a time when legal offices were bestowed without regard to the fitness of those who received them. Yet it is recorded in the pages of history that once upon a time there was a Lord Chancellor who was in the habit of selling masterships in Chancery. This was, indeed, the gravest of the twenty-one articles of impeachment which the House of Commons formulated against Thomas Parker, Earl of Macclesfield, in the year 1724. The mastership in those days was a splendid appointment compared with which the modern mastership is a very shabby affair. It was therefore worth buying.

Master Bennet, who gave evidence against Lord Macclesfield, appears to have got his mastership at bargain prices, for he paid no more than 1,500 guineas. Master Elde paid more; for he brought in a basket to the Lord Chancellor's house five thousand guineas in gold and notes, being the price of his mastership. Master Thurston's negotiations were conducted through the Lord Chancellor's lady. He left on the Countess of Macclesfield's table 5,250*l.* in bank notes, of which, at a later date, she sent back 3,250*l.* His Lordship was fined 30,000*l*; and King, C.J., who sentenced him, also succeeded him on the Woolsack.—*L.J.*, 1929, p. 185.

Lord Finlay and Lord Phillimore.—During the past week, death has removed two revered and beloved lawyers from our midst. Lord Finlay died on Saturday at the age of 86, and Lord Phillimore on Wednesday at 83; each was full of years and honour. It is a melancholy coincidence that the two Englishmen who have, perhaps, been more closely connected with the Permanent Court of International Justice than any others of their countrymen should have passed away in a single week; Lord Phillimore was the English representative on the Commission which sat at The Hague in 1920 to prepare the scheme for the establishment of the Court, and Lord Finlay was the first British member of it. In the case of Lord Phillimore, the attraction to international law was hereditary; for his father, Sir Robert Joseph Phillimore, was a well-known authority on the subject, as well as being famous as an ecclesiastical and Admiralty lawyer—he was the

last Judge of the Court of the Lord High Admiral, and one of the original Judges of the Probate, Divorce and Admiralty Division created by the Judicature Act of 1873. Lord Phillimore, like his father, specialised at the Bar in ecclesiastical and admiralty work; but not wishing to try divorce cases, he accepted a King's Bench judgeship and became a great common law judge. Elsewhere in this issue we refer to Lord Finlay and his career; and next week we shall deal more fully with the life and work of Lord Phillimore.—*L.J.*, 1929, p 193.

Lord Atkin's Counsel.—There has grown up a pleasant custom by which, at the Annual Reception given to the past and present students of the Law Society's School, some distinguished lawyer is invited to address the assembly, and to give to those present the benefit of his experience of life and of law. At Wednesday's function the speaker was Lord Atkin, and his address was compact of sage counsel. He made four main points. First, the student should remember that education goes on throughout life, and that that part of it which comes to a close with a "final" examination is really only an equipment for commencing real education. Secondly, the lawyer's chief duty is to prevent disputes from arising, and not to foment them; as he very truly said, every reputable lawyer recognises this principle and acts upon it, lay opinion to the contrary notwithstanding. In the third place, he reminded his hearers that not only the judiciary, but all members of the profession, are ministers of justice, and should have the ideal of assisting in its pure administration always before them; and, lastly, he said that the work that really counted was the work that was given —work that was done of the love of the task and for the achievement of an end, not work done merely for the material gain of the doer. A very inspiring address.—*L.J.*, 1929, p. 193.

The Lord Chancellor on Departmental Legislation.—As we anticipated, clause 123 of the Local Government Bill, which allows the Minister of Health, "if any difficulty arises in connection with the application of this Act to any exceptional area, or in bringing into operation any of the provisions of this Act," to make such order for removing the difficulty as he may judge to be necessary, and thereby to modify the provisions of the Act, has received further criticism in the House of Lords. In the House of Commons, in consequence of the opposition to the clause, certain changes were made, but as we pointed out, these did not really alter its effect. In the House of Lords,

the Lord Chancellor has found it necessary to make a further concession. Lord Askwith's amendment requiring the positive approval of Parliament to any Order made by the Minister he did not accept. The consequent delay, he considered, would interfere with administrative dealings, where prompt action was required. But Lord Hailsham offered as a compromise to propose on the Report stage an amendment which, while not preventing an Order from coming into operation, would annul it if express Parliamentary approval was not given within three months, allowance being made for periods when Parliament is not sitting. This is in lieu of the Order merely lying on the Table of both Houses. The proposed amendment should impose an effective check on departmental legislation, and will, it is presumed, be incorporated in other similar Bills.—*L.J.*, 1929, p. 194.

The Age of Marriage.—A Bill which at first sight would seem to involve but little controversy has occasioned two animated and, at times, acrimonious debates in the House of Lords during the past few weeks. During February Lord Buckmaster introduced a Bill of which the material provision is;

A marriage between persons either of whom is under the age of sixteen shall be void.

In moving the second reading, he referred to a case in which a girl of twelve or thirteen had been the subject of rape by a man of about thirty. The offender was charged with the offence and thereupon married the child, so that, to use Lord Buckmaster's phrase, she might be "unable" to give evidence against him. This particular instance, if not the *causa sine qua non* of Lord Buckmaster's interesting himself in the matter, seems, at any rate, to have been the *causa causans* of the introduction of the Bill at the moment. Amid universal expressions of approval of its principle, the Bill was read a second time. On February 23 it came before the House of Lords for the Committee stage, whereupon Lord Darling moved to leave out the word "void," and to insert:

"voidable by either party to the marriage on an application to be made to the Court in accordance with Rules of Court before both parties reach the age of sixteen"

Lord Darling explained that marriages by persons under the present legal age of consent—fourteen for boys and twelve for girls—are at present voidable, but not void, and that the result of his amendment would be to raise the age of consent to marriage to sixteen, but otherwise to leave the law as it stands.—*L.J.*, 1929, p. 194.

"Festina Lente."—Incidentally, he pointed out that in the case of rape cited by Lord Buckmaster, the child would not become incompetent as a witness by marrying the accused, but Lord Buckmaster retorted that as she would not be a compellable witness, it might practically be said that she would be unable to testify against him. After a spirited debate, the Committee stage of the Bill was adjourned, and was resumed on Tuesday, when, after a most eloquent appeal by Lord Buckmaster for progress to be made, Lord Darling moved and carried a motion for its reference to a Select Committee. A remarkable division of legal opinion was manifested in the debate, Lord Buckmaster, Lord Parmoor and Lord Reading maintaining strongly that the Bill should be dealt with at once by the House, and that marriages by persons under sixteen should be not voidable but void, regardless of what may be called collateral consequences, and Lord Darling, Archbishop Davidson, Lord Hanworth, Lord Halsbury, K.C., and Lord Desart urging that such an alteration in the law should only be made after the matter had been carefully considered in all its aspects by a Select Committee. In the result, the Bill was referred to a Select Committee by 37 to 29, the Lord Chancellor voting with the majority. Everyone must be in sympathy with the object of the Bill, and, as at present advised, we are inclined to think that it would be better to make marriages by persons under sixteen absolutely void, and not merely voidable. But the proposal obviously raises important issues—it would, for example, render illegitimate a certain number of children who would otherwise be born legitimate—and a full investigation of these issues ought to enable an agreed Bill to be prepared and passed with a minimum of delay.—*L.J.*, 1929, p. 194.

Dominion Status.—The Imperial Conference of 1926 laid down for the relations of Great Britain and the Dominions a formula which in some respects is on the same footing as the Constitution of the United States. Mr. J. H. Morgan, K. C. took it as the text for his Rhodes Lecture at University College on Friday, the 15th instant "Great Britain and the Dominions are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." This declaration resembles the Constitution of the United States in that, once laid down with the consent of the representatives of the Dominions, there is no

going back upon it. What may be the practical consequences of the formula—that is another matter. Written constitutions, like those of the United States, have to be worked out by practice and by judicial decision. The declaration as to Dominion Status is not of a nature to be submitted to any Court for decision. It can only be worked out by practice, and Mr. Morgan's lecture usefully points out the matters in which practice may elucidate it; in particular, to what extent sovereignty can be attributed to the Dominions. It is, he says, much more than the sovereignty of an American State; much less than the sovereignty of an International State—that is, we presume, a State recognised between nations as independent. Three points there are, however, which define the position: the common allegiance to the Crown; the internal autonomy of the Dominions; and the subjection to the control of the central Government in extra-territorial matters; and, though Mr. Morgan did not on this occasion mention it, there is the jurisdiction of the Judicial Committee, still a real jurisdiction, though in some of the Dominions its scope is diminishing. The first sign of the semi-sovereignty of the Dominions was when they appended their separate signatures to the Covenant of the League of Nations.—*L.J.*, 1929, p. 213.

The Expensiveness of "Silks".—The recent remarks of Lords Justices Scrutton and Sankey as to counsels' fees have very naturally occasioned a considerable amount of public comment, and our own observations on the matter have been freely quoted in the lay press. We expressed the view (*ante* p. 174) that the fact "that litigation is being 'killed' by the large fees paid to counsel is not the fault of the Bar, and still less the fault of the solicitors; it is the litigant himself who is responsible." "This," says the *Liverpool Echo* (March 11) "will not stand examination"; "This", says *Truth* (March 13) "is perfectly true." We hope we may be forgiven if, on such a matter as this, we regard *Truth* as being the better informed of the two. The *Liverpool Echo* proceeds to examine our proposition:—

> It is true that a few wealthy litigants may on occasions demand the services of fashionable counsel at fancy fees, and those persons are wealthy enough not to bother about what they pay. But the ordinary litigant is not responsible for high fees. The legal profession—both branches—benefits from these high fees; the litigant certainly does not Others have vested interests in high fees; he is in danger of being ruined by them.

This statement is, with all respect, inaccurate as to its facts and fallacious as to its reasoning. If the demand for the services of "fashionable counsel at fancy fees" were restricted to

"a few wealthy litigants," there would neither be "fashionable counsel" nor "fancy fees". It is the constant and imperative demand for his services that makes counsel "fashionable"; and the "fancy fees" are the measure of this demand, and are, indeed, often fixed in an endeavour on the part of the counsel concerned to limit the amount of his work. *Truth* puts the matter very neatly:—

> The public has a weakness for legal, as well as theatrical "names," and, by the law of supply and demand, the prices go up. A few famous barristers make huge incomes, while the greater part of the profession make very small ones.

—*L.J.*, 1929, p. 214.

A Blessing or a Curse.—And why is it suggested that "the legal profession—both branches—benefits from these high fees?" The only persons who in fact benefit are the "fashionable" leaders and their clerks, and the juniors who happen—for most of them very occasionally—to be briefed with them. The solicitor gets no benefit whatever; but he shares with the vast majority of the members of the Bar in the disadvantages caused by the undoubted fact that lay clients demand the services of fashionable leaders, and that if they find their fees too high to enable them to employ them, they frequently prefer to settle rather than to brief a lesser-known but possibly equally efficient "silk". It is by no means in the public interest that litigation should decline on account of the expense involved, wherever the responsibility for the present position lies; but the remedy is in the hands of litigants themselves. The "two-thirds" rule, under which the junior is entitled to a fee two-thirds that of the leader, is often blamed; but it is a perfectly reasonable rule where an ordinary leader is briefed at an ordinary fee. The problem will only be solved if and when litigants realise that their interests can be as well protected by counsel who are not forced by the demand for their services to charge prohibitive fees as by those whose names are familiar to them by reason of their constantly appearing in the comparatively rare cases in which expense is no object.—*L.J.*, 1929, p. 214.

Piety, Punishment, and Other Matters.—Indeed it was said, not without cause, that his horror of sexual offences and marital infidelity was so intense that he did not fail, when opportunity offered, to express his abhorrence in terms of penal servitude. It was a natural, if not a judicial, expression of the views and personality of a man of deep religious convictions; and in time, while not abating one jot the strictness of his views, he learnt to

moderate the severity of his punishments. In 1921, when the Criminal Law Amendment Bill was in the House of Lords, he stoutly opposed the proposal to abolish the defence of reasonable cause for believing that a girl was sixteen years of age. On the other hand, he opposed, even more stoutly than the Bishops, the passage of Lord Buckmaster's Divorce Bill.

Of the sayings quoted in the recent biographical notices perhaps the most notable is that of the Master of Westminster School, that the "Phillimores are all clever, but none of them has any common sense"; while a *Punch* epigram which appeared some time ago perpetrated a pardonable pun when it observed:—

"We had not liked his law so much
Loved we not Phillimore."

—*L.J.*, 1929, p. 224.

Legitimacy Act, 1926.—In the case of *Jones* v. *Jones* (*post,* p. 179), Mr. Justice Hill delivered a considered judgment on Monday last. His Lordship held that the court had no power on the application of one of the parties to a divorce suit to make an order for the custody of a child born before their marriage and legitimated by the Legitimacy Act, 1926, although such child had subsequently been re-registered in accordance with the provisions in the schedule to the Act. The evidence in the case was similar to that in *Green* v. *Green* (1928, 140 L.T. Rep., p. 93), except that in that case there had been no re-registration, and it was held that the addition of the evidence of re-registration did not take the case out of the authority of the earlier case. Where a child was born before marriage the difficulty in the way of an order for custody arose, in his Lordship's view, not from lack of evidence, but from lack of the necessary parties, and, therefore, of jurisdiction. An order was made giving the applicant the care and control of the child in exercise of the general jurisdiction of the High Court with regard to infants, but the order for custody was refused. The cases have made it clear that the automatic legitimation conferred by the Act is not conclusive for all purposes, and, therefore, where questions of status or proprietary rights are likely to arise it is advisable to apply for a declaration of legitimacy under S. 2 of the Act, when all parties concerned can be represented, and an effective judicial decree made.—*L.T.*, 1929, p. 172.

The Rule of the Road.—A writer in *The Times* on Wednesday recommends the rule, "keep to the right," as the safest rule

for pedestrians in pathless country lanes after dark, but says that in daylight he has always found it best to "keep to the rule of the road" by walking on the left or near side. He asks whether, if he adopts the advice often given him to walk on the right side in daylight as well as after dark, the driver of a vehicle meeting him should pull out and let him continue on the right side or whether he himself should step towards the middle of the road and risk being overtaken by a second vehicle. The "rule of the road" to which the correspondent refers is, as a legal rule, of very restricted application, the courts having held that there is no rule of law that a driver should keep to the left or near side in all circumstances. On a clear road with nothing in sight a driver can take any part of the road he chooses, subject to his obligation to keep a sharper look-out and when he sees a vehicle to go to his proper side in good time. Under S. 78 of the Highway Act, 1835, the driver of any wagon, cart, or other carriage whatsoever, or of any horses, mules, or other beasts of draught or burden meeting any other wagon, &c., must keep "on the left or near side of the road"—*i.e.*, to the left side of the centre of the road, not necessarily close to the edge or kerb on the near side. S. 28 of the Town Police Clauses Act, 1847 also provides that in districts in which that Act is in force a driver meeting any other carriage shall keep his wagon, &c., to the left or near side, and passing any other carriage shall keep on the right or off side, except in cases of actual necessity or some sufficient reason for deviation, but there is no general legal rule even for vehicles and no legal rule whatever for the anxious pedestrian.—*L.T.*, 1929, p. 172.

Child Marriages.—In recent comments on Lord Buckmaster's Bill we indicated that Lord Darling had in mind some far-reaching amendments. These have now been developed and they certainly open up some grave considerations. Lord Buckmaster's main proposal is that a marriage between persons either of whom is under sixteen shall be void. Lord Darling has an amendment which would leave out "void" and insert "voidable", and he would leave it to either party to the marriage to make an application to the court in accordance with rules before both parties reach the age of sixteen. This proposal is not due to any desire to wreck the Bill, but is founded on the grave results which would ensue by bastardising children of these marriages. This is surely an effect of the Bill such as calls for no little reconsideration. It is apparently the fact that this grave result would be a very common feature in these cases; for pregnancy is to be

found in sixty-four per cent. of marriages of girls under sixteen. Obviously the desire for marriage is largely based on the wish to regularise the birth of a child. Another effect of the Bill was mentioned by Lord Darling. He assumes that one of these marriages has been contracted and the parties have lived together for a long period of years. The wife, believing herself to be a wife, pledges the man's credit. She is pressed for payment and the man repudiates liability for the most elementary needs of life. He could simply say that there had not been a marriage, and rely on the provisions advocated so earnestly by Lord Buckmaster. The arguments used by Lord Darling have apparently been reinforced by the views of certain Church authorities and social workers, who would clearly not seek to oppose the general principle of the Bill, but who realise that it may be necessary to subject it to some drastic amendment in drafting. Lord Darling has clearly acted with wisdom in securing a little time for reconsideration, and as the Bill is down for re-examination on the 12th March, there is no reason why this short delay should not be of ultimate benefit to the scheme. If there is one subject on which legislation should not be rushed it is that upon which the whole home-life of a Christian country is based.—*L.T.*, 1929, p. 204.

The Police Commission Report.—The report of the Royal Commission under the chairmanship of Lord Lee of Fareham appointed in August last to report on the conduct of the police in the investigation of crimes and offences was published a few days ago. The report, which is a lengthy one and raises points which call for careful consideration, will be dealt with more fully in a subsequent issue: meanwhile an indication of its general tenor may be useful. In the first place it is not a general white-washing of the police and their methods, but it is a rebuttal of the sensational charges against their general good faith which gained some credence a year or so ago. Much of the criticism levelled of late against the force has its root cause, it is suggested, in its being called upon to enforce laws which are out of harmony with public opinion, an antagonism thus being aroused which hampers them in the general carrying out of their duties. Whatever precisely "Third Degree" methods may mean when applied to the English force by their accusers, the committee have no belief in their existence, nor in the trumping up of "faked" charges. On the other hand they incline to agree with witnesses of authority that there is an occasional tendency on the part of the Police, when they consider a prisoner to be guilty, to strain the evidence against him so as to secure his conviction: they agree, in short,

that "police evidence is usually excellent, but must be carefully watched." Further, a somewhat trenchant criticism is passed on Scotland Yard in that it has a tendency to regard itself as "a thing apart" to which ordinary police restraints should not be held to apply. As regards the much-discussed question of statements from persons not in custody, the committee point out that the combined effect of rules (1) and (2) of the Judges' Rules is that a policeman can question a suspected person without administering a caution right up to the moment at which he makes up his mind to arrest or charge, the moment at which it is administered being capable of being varied for "tactical" purposes. This they hold to be contrary to the spirit of the caution, and they recommend that at the outset of any formal questioning, whether of a suspected person or a potential witness, a constable should deliver a simple caution in non-technical language which could be readily understood by anyone. The witness "whose personal character is involved" would, in the view of the committee, require no special warning, and they advise withdrawal of the provisional order to the Metropolitan Police. Another recommendation of which there will probably be approval on the part of the Profession, is that statements of accused persons tendered in evidence should, so far as practicable, be communicated to the court in the language of the accused, both answers, and, be it noted, questions, being taken down as nearly as possible in the actual words. In so recommending the committee say that they have in mind the danger "that a statement may imperceptibly change its meaning in the process of passing through the mind of another person, who expresses in different, though possibly better, language, what he considers to be the true meaning of the deponent, but who has a preconception of the facts in his own mind to which he is perhaps unconsciously aiming to take the narrative conform." The difficult matter of offences against the liquor laws and the use of surreptitious methods by the police elicits a recommendation for the introduction of legislation giving the police a right of entry to all registered clubs. Of the Director of Public Prosecutions and his department the report has little to say: it does, however, express the opinion that recourse should be had somewhat more freely to the practice by which in certain exceptional cases statements are taken by this department instead of by the police. The next step is with the Government.—*L.T.*, 1929, p. 257.

Copyright in Photographs.—The case of *Shasa Limited* v. *Stoenesco,* in which Mr. Justice MacKinnon last week granted

an injunction, calls attention to the law of copyright in photographs and to the need for definite agreements where the photographs of "celebrities" are concerned. The plaintiffs, who specialised in photographing celebrities, claimed damages for infringement of copyright in the photographs of six well-known actresses. The defendant pleaded that each photograph was "ordered" by the subject of the picture, or by some other person, and was made for "valuable consideration." The principal question in the case, therefore, turned on the proviso (*a*) to sub-sec. (1) of section 5 of the Copyright Act, 1911. The sub-section and proviso read as follows:

(1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein · Provided that (*a*) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright.

Some of the sitters who gave evidence stated that they had purchased copies of the photographs—twelve guineas a dozen having been paid in one case—and one sitter claimed that she had stipulated that the copyright in her photograph should be her property. The manager of two of the sitters, who claimed that the copyright of his clients' photographs belonged to them, stated that in such cases it was usual to arrange for "part copyright," the photographer being allowed a few weeks to get his publicity and profit from the illustrated papers. His Lordship said that the real question was whether the requests made by the various persons concerned implied any legal liability to pay for the work done in making the negative if no copies were ordered. After going carefully into the evidence His Lordship held that all the copyrights were in the plaintiffs and not in the respective sitters, and he gave judgment accordingly. Having regard to the difficulty in such cases of deciding whether a request to be allowed to take a photograph has been followed by an "order" to do so, and in the view of the possible importance in certain cases of being able to control the publication of portraits which may be deemed caricatures or even "libellous," simple and definite forms of agreement seem advisable in such cases.—*L.T.*, 1929, p. 258.

Our Modern Peerage.—The publication of the delayed "New Year" Honours List serves to recall how modern, comparatively speaking, are either the various grades of distinctions, or the majority of the creations now enjoyed by those whose order has

an ancient origin. With the exception of secondary titles, *e.g.*, the Duchies of Lancaster and Cornwall, held by His Majesty or the Prince of Wales, all the royal dukedoms have been conferred within the past sixty years. Conversely, however, the dukedom of Westminster was the last to be bestowed on a subject. This was in 1874, the same year which saw the creation of the royal dukedom of Connaught. Even so, Norfolk is the only duchy which dates back to pre-Tudor times, 1483.

"Jockey of Norfolk, be not too bold,
For Dickon thy master is bought and sold."

Again, Somerset, first held by Edward VI.'s ill-fated "Lord Protector," is the sole remaining Tudor patent, chiefly because Elizabeth made no dukes at all during her long reign, and desired to see this dignity fall into disuse. The title of Marquis, which John de Beaufort, in Henry VI.'s day, refused "as a new honour altogether unknown to my ancestors," was in fact imported from Germany in the fourteenth century. But with the exceptions of Huntly and Winchester, Tudor, Queensberry, Lothian and Tweeddale, Stuart, attainders and defaults of heirs male have so depleted the order that all the other forty odd holders are the result of creations less than two centuries old. What is true of the two senior grades of the peerage applies equally to earldoms, viscounties and baronies. Baronetcies, of course, did not originate till James I.'s reign, while, with the notable exceptions of the Garter—the revival of the Bath was engineered by Walpole to serve his own purposes—and "the accolade of knighthood,'' all the other orders of chivalry certainly cannot be called ancient in the English sense of the word. All the same, those who cavil at the multiplication of honours and dignities hardly sufficiently remember that population has also very nearly trebled within the past hundred years, and the service of Empire now implies vastly more than it did when a turn at "shaking the pagoda tree" was the principal reward desired or obtained.—*S.L.J.*, 1929, p. 131.

A "Jactitation" Slander?—According to a newspaper, a popular American actress, now appearing in England, has been troubled by the claim of a man unknown to her that she is his "little wife", and has issued a writ for slander. The lady's advisers are said to have considered recourse to the ancient remedy of "jactitation," but to have rejected it because her nationality would have complicated matters. It does not appear, however, that domicil is required to give jurisdiction in jactitation as it is in divorce. Does then a man slander a woman

by falsely asserting that she is his wife? If she is somebody else's wife, and living with her husband, then no doubt he does so, for there is an obvious implication of unchastity. If she is a spinster, however, the defamation is not so clear. The man in effect asserts that he has chosen her for his highest compliment, which hardly seems defamatory. Possibly such a statement might drive off an eligible suitor, and thus cause a temporal loss, but there still remains the difficulty as to defamation. In *Duplany* v. *Davis*, 1886, 3 T.L.R. 184, the plaintiff, an actor, recovered £100 from the defendant, a contributor to a paper called *The Bat*, for falsely stating that the plaintiff had been a waiter. There was also the further suggestion that he was not a good actor, but it is somewhat difficult to follow the decision that such a statement was an actionable libel, for a waiter might reveal himself as an excellent actor, and it is well known that star comedians often rise from very humble origin. In *Shapiro* v. *La Morta*, 1923, 68 L.J. 522, a professional accompanist brought an action to recover damages for the loss of an engagement on a date when the defendants falsely asserted that she had agreed to accompany one of them in their concert, but the action failed on the issue of malice. Possibly an actress might be more popular, and a better "draw" as a spinster than as a wife, but that proposition has never been established, and seems very doubtful, in view of some of the most popular actresses being wives, not to say even divorcees. Whether a lady who lost a suitor could sue on such a false statement appears open to doubt. The suitor would have to give evidence, and, if still a bachelor, would have to explain why he did not marry the plaintiff when he found out the mistake. If he had married some one else before then, his position in giving such evidence *vis-a-vis* his lawful wife would be a delicate one. —*S.L.J.*, 1929, p. 132.

Leaders as Super-Luxuries.—An old controversy is revived by Lord Justice Scrutton's recent description of a leader as a "super-luxury and the unusual order of the Court of Appeal in regard to his fees. The suggestion that a litigant should not be allowed to avail himself of the best professional assistance obtainable is not one, we think, which will commend itself to many people. It is unquestionably desirable in the interests of the public and of the profession alike that the cost of litigation should be kept within reasonable limits, but it would be disastrous for all concerned if serious challenge were made to the citizen's right to retain the most skilful lawyers, a right as

indisputable as that of employing the most expert surgeon or architect. There remains the question of fees. The majority of litigants, being business men, are not prepared to pay more for a commodity than its worth. The barrister—both silk and stuff—dependent as he is entirely on his own skill, can command no higher price in the professional market than his services are worth, and to that price he is entitled. In this country, the professional standard is high; this is mainly due to the attraction offered to brilliant men by the possibility of ultimate rich reward. Refuse the prizes and brilliant men will no longer compete; the standard of professional skill will be lowered and the public will be the victims.—*S.L.J.*, 1929, p. 147.

BOOK REVIEWS.

THE ADVOCACY SERIES: VOL. VI. TRIAL TACTICS, by P. Ramanatha Aiyar and N. S. Ranganatha Aiyar. Price Rs. 3.

Book-maxims, we doubt, have much to do with the success of a lawyer, especially of one who belongs to trial Courts, where methods of conducting trials have often conformed to individual genius and personal experience. But a book of this nature, compiling some of the best lessons from stalwarts of the past, needs deservingly to be welcomed for the variety and taste of the innumerable illustrations. A Russell, with his enormous confidence which easily led him to a foremost position, or an Erskine famed for his eloquence which often captivated the Judge and the Jury, or a Webster an all-round accomplished legal luminary whose grasp of the fundamentals was infallible, cannot but strike the imagination of the reader as powerful exponents of the different methods of assuring success to the earnest practitioner. We are fortunate in having in this volume some portions of the trial of Tilak libel case, though we feel we could be still more genuinely pleased if only some specimens of the advocacy of our own eminent leaders had been brought out. It may not be unjustifiable, if the reader feels prone to judge every addition to this Series to have chosen almost the same topics with perhaps fresh illustrations from the inexhaustible storehouse of the legal annals and traditions of the Bar of Western countries.

Anyhow our thanks are due to the endeavours of the authors in presenting the Legal World with such a fund of information for the shaping of careers.—*K.C.*

HINDU LAW AS ADMINISTERED IN BRITISH INDIA, by Sir Ernest Trevelyan, 3rd edition, revised by the Author and

T. Chatterji, B.A., of Lincoln's Inn, Barrister-at-Law. Published by Messrs. Thacker, Spink & Co., Calcutta. Price Rs. 25.

It is nearly twelve years since the appearance of the last edition of Trevelyan's Hindu Law and we are indebted to Mr. Chatterji for bringing out the third edition of this useful text-book on Hindu Law. Owing to the death of Sir Ernest Trevelyan who, we understand, thoroughly revised the present edition and brought it up to 1923, the present editor has undertaken the task of noting the changes, since then, under the statutes and noticing the cases reported up to the 31st of December, 1927. While the distinctive feature of Sir Ernest Trevelyan's work, *viz.*, the lucidity of the statements of law is noticeable throughout the present edition, one cannot help feeling that the present editor might have taken greater liberties with the text of the work. To make our meaning clear, in dealing with the question of the validity of ante-adoption agreements, if one may use such a compendious expression, on the adopted son, the leading decision of the Privy Council in *Krishnamurthi* v. *Krishnamurthi*, (1927) 54 I.A. 248 has considerably shaken the previous notions on the validity of such arrangements. Though this decision of the Privy Council is noticed by the editor in the footnote on page 200, we are not sure that the statement of the law in the body of the work is fully in accord with their Lordships' decision in the case. We also notice in some places some important recent decisions not being noticed. Dealing with the legal consequence of a portion only of the consideration for an alienation by a limited owner or manager of a Hindu family being for necessity, we find the law stated on p. 554 as it was understood prior to the decision of the Privy Council in *Krishn Das* v. *Nathu Ram*, (1926) 54 I.A. 79 which disapproves of many of the decisions relied upon on that page. The decision of the Privy Council was given in December 1926 and was reported early in 1927. These features to some extent detract from the quality of the work and would, we hope, be remedied in any later edition of the work. We are however glad at the re-appearance of a well-known treatise and we congratulate the editor on the same.

THE LAW RELATING TO RECEIVERS, by Sir John Woodroffe, 4th edition, 1929. Published by Messrs. Thacker, Spink & Co., Calcutta. Price Rs. 12.

Even since its publication, Woodroffe's Law of Receivers has been the leading Indian text-book on the subject and we are glad to find that the author even after retiring from the Bench

has thought fit to bring out a new edition of the book. The book is not encumbered with case-law and the various points dealt with more in the light of principle than by reference of latest decisions. This mode of treatment while it has its obvious advantages, sometimes embarrasses the busy practitioner who is after precedents. We have no doubt that this edition will maintain the popularity of the preceding ones and the legal profession will find in it an up to date text-book on the subject.

THE LAW OF PLEADINGS IN BRITISH INDIA, by P. C. Mogha, 3rd edition, 1929. Published by Messrs. Eastern Law House, Calcutta. Price Rs. 10.

We had occasion to review the prior editions of this useful publication in our pages. It is unnecessary to stress the fact, that a thorough grasp of the principles and practice of pleadings is necessary for a practising lawyer and he cannot for that purpose turn his attention to any other Indian treatise than the one under review. The book proceeds on the well-known lines of Bullen and Leake on Pleadings and the popularity and usefulness of the work are clearly brought out by the circumstance that the third edition has been called for in less than three years after the second. We have no doubt that this work will be freely consulted by all lawyers in British India. We only wish to note that the author has in the present edition newly added precedents of applications under the Indian Succession Act and the Indian Arbitration Act and also of some commercial suits.

We are glad to acknowledge the receipt of the Madras Acts (Criminal, 1802-1927), Part IV, by P. Hari Rau, B.A., B.L., published by T. A. Venkaswami Rao, B.A., Mount Road, Madras

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LAW OF IDENTIFICATION, by M. K. A. Khan, K.S, M.A., LL.M.

This is the fifth of the series of the useful publications of the Civil and Criminal Law Series brought out by Mr. Khan. The subject is one of importance in the Civil as well as the Criminal Courts and the author has collected together matters scattered over several books. We have no doubt that this book will be found as useful as the others of the series.

[END OF VOL. LVI.]

THE

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NOTES OF INDIAN CASES.

MARTIROSI *v.* SUBRAMANIAM CHETTIAR, I.L.R. 51 Mad. 103 : 54 M.L.J. 49 (F.B.).

The Full Bench had to consider in this case the question whether the Court could extend the time for making the award after the award is made. The question arose under the Arbitration Act. Though the language is slightly different from that used in the Civil Procedure Code, it does not seem to be materially different. Under the Civil Procedure Code of 1882 the Privy Council held in *Raja Har Narain Singh* v. *Chaudurain Bhagwant Kuar*[1] that after the making of the award the Court had no power to extend the time. The Civil Procedure Code has since, however, been amended. Whereas the old Civil Procedure Code said "If from want of necessary evidence or information or from any other cause the arbitrator cannot complete the award within the period specified in the order, the Court may if it thinks fit and from time to time enlarge the period for the delivery of the award or make an order superseding the arbitration." Schedule II, para. 8 of the present Code provides thus: "Where the arbitrator or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period or may make an order superseding the arbitration." Section 521 of the old Code prescribed that no award shall be valid unless made within the period allowed by the Court. It is on the construction of Sections 514 and 521 their Lordships of the Privy Council held that the Court had no power to extend the time for making the award after the award is made. Sch. II, para. 15 now prescribes that no award shall be set aside *inter alia* except as having been made after the expiration of the period allowed by the Court. The relevant provisions of the Arbitration Act

1. (1891) I.L.R. 13 A. 300 : L.R. 18 I.A. 55 (P.C.).

are : Section 12.—The time for making the award may from time to time be enlarged by order of the Court, whether the time for making the award has expired or not. Section 13 (1).—The Court may from time to time remit the award for reconsideration of the arbitrators or umpire. Clause 2.—Where the award is remitted under Sub-section (1) the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months. The questions the Court had to consider in this case were : (1) Whether under Section 12 the Court could extend the time after making the award, (2) Whether under clause 2 after three months' time has expired and after the award is made, the Court can extend time. Their Lordships held following the English cases that the Court could extend time even after the award is made. In the construction of an Act, which is *pari materia* with an English Act and is based substantially upon it, it is an approved rule of construction in India that the interpretation put upon it in England must also be taken to be the proper construction in India. The only difficulty in the way was the judgment of the Privy Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[1]. The inclination of opinion on the part of the referring Judges would seem to be that that ruling is no longer applicable even in cases governed by the Civil Procedure Code by reason of the changes introduced in the language of the section. Whereas Section 514 of the Civil Procedure Code of 1882 did not contemplate the extending of time after the expiry of the time fixed, the present Code expressly provides for such extension. This circumstance was one which weighed strongly with the English Court in *Lord* v. *Lee*.[2] Justice Blackburn as he then was puts the argument thus : "Suppose the arbitrator inadvertently to have neglected to enlarge the time, and several meetings to have been held in the interval before the omission is discovered; if the subsequent enlargement of the time had only the effect of a new submission, all the witnesses must be recalled and all the expense must be incurred once again. It happens in the present case that the award was made before the oversight was discovered and the order obtained. Surely it is a very salutary enactment which enables a Judge to cure a defect which he thinks a mere defect of form, and which the parties might have cured themselves. I am therefore clearly of opinion that the section gives power to

1 (1891) I.L.R. 13 A. 300 : L.R 18 I.A. 55 (P.C.).
2. (1868) L.R. 3 Q.B. 404 at 409.

the Judge to enlarge the term for making the award at any time, and under any circumstances in which he thinks there is good cause for his intervention, and the effect of the enlargement is the same as if it had been by the parties; it amounts to a ratification, and is as if the enlarged time had been originally in the submission." This argument would seem to apply to the Civil Procedure Code as it stands at present.

SONACHALAM PILLAI *v.* KUMARAVELU CHETTIAR, I.L.R. 51 Mad. 128 : 54 M.L.J. 8 (F.B.).

The Full Bench held in this case that the conclusion in a representative suit is binding as against the individual members of the class even though no leave was taken under Order 1, Rule 8. Once the view was held in Madras that even in cases where the karnavan is sued as such, without action being taken under Section 30, Civil Procedure Code (which corresponds to O. 1, R. 8) the judgment would not bind the other members. In the position taken by the Full Bench there is a considerable amount of risk of public interest suffering by individual negligence or default. But there are several safeguards. In such cases the Court might well insist upon the procedure of Order 1, Rule 8 being adopted. By a judicious exercise of its power of making parties, possibility of collusion might be excluded. Again, not all suits where parties have common interest are representative suits. The previous suit must be one in respect of a public or private right claimed in common for the previous parties and others. If the right claimed is one not claimed in common but is an individual right similar to that of others, the clause will not apply. No representative action will lie for instance to recover damages though the alleged ground of action is a common injury nor can any personal decree be passed against persons not parties *eo nomine*. *Sahib Thambi* v. *Hamid*,[1] *Sadagopa Chari* v. *Krishnama Chari*[2] and *Markt & Co., Ltd.* v. *Knight Steamship Company, Ltd. Sale & Frasar* v. *Knight Steamship Company, Ltd.*[3] In *Jenkins* v. *Robertson*[4] it was held that in a declaratory action in respect of a public right there can be no binding compromise. A different view is taken in *Krishnamachari* v. *Chinnammal.*[5] Their Lordships of the Privy Council leave the question open whether the proposition is not too broadly stated in

1. (1911) I.L.R. 36 Mad. 414 : 22 M.L.J. 109.
2. (1889) I.L.R. 12 Mad. 356.
3. (1910) 2 K.B. 1021. 4. (1867) L.R. 1 H. L. and Sc & Div. 117.
5. (1913) 24 M.L.J. 192.

Jenkins v. *Robertson*[4]. See *Abdur Rahim* v. *Syed Abu Mahomed Barkat Ali Shah*[6]. Their Lordships however seem to be clear that a suit for a declaration that the suit property is *wakf* property and not the personal property of the defendants is not a suit of a representative character and a compromise decree passed in such a suit is not binding. This decision would seem to overrule *Mahomed Amir* v. *Sumitra Kuar*[7] relied upon in the case under review. This fact cannot be said necessarily to affect the general conclusion but would seem to be sound in a contrary sense. S. 11, clause (*vi*) rightly speaking applies only to decisions of Courts and as such would exclude compromise decrees and the binding nature of compromise decrees would seem to depend on general principles rather than on Section 11. Viewed from that point of view, it is hardly a necessary inference from the fact that a person represents another, he should be entitled to compromise also. If he is otherwise authorised to compromise there may be nothing against the compromise being held binding because the action is a representative one. Whatever the case with compromise, it is the rule in England that the parties represented are not affected by the abatement of the suit by reason of the death or bankruptcy of the parties on record or by discontinuance by them. The same rule should apply to representative actions in this country whether authorised under Order 1, Rule 8 or otherwise.

GIRDHAR DOSS & CO. *v.* PARA APPADURAI, I.L.R. 51 M. 157 : 54 M.L.J. 316.

It was held by the Bombay High Court in an early case in *Shirekuli Timapa Hegda* v. *Mahablya*[8] that a clause of forfeiture in a decree passed on a compromise even could not be relieved against on the ground that the "doctrine of penalties is not applicable to stipulations contained in a decree". So far as compromise decrees are concerned this ruling has been dissented from in Madras and does not seem to be adhered to even in Bombay though it is expressly dissented from only in so far as it affects subsequent suits based on the compromise decree In this case, their Lordships held that that doctrine cannot apply to decrees proper and therefore the Court had no power to relieve. Fraud might be an exception but their Lordships had not to consider that aspect of the question.

4. (1867) L.R 1 H.L. and Sc. & Div. 117.
6. (1927) L.R. 55 I.A. 96: I.L.R. 55 C. 519. 54 M.L.J. 609 (P.C).
7. (1914) I.L.R. 36 A. 424. 8. (1886) I.L.R. 10 B. 435.

FULI BIBI v. KHOKAI MONDAL, I.L.R. 55 Cal. 712.

In this case two infants purported to sell their interests in certain lands, one of them conveying her interests herself and the other being described as a minor acting through her husband who was however not her guardian in law; and the present suit was brought by both of them to recover the properties sold from the vendee on the ground that they were minors at the date of sale and consequently it was void and conveyed no title. The principal question was, whether before recovering possession of the properties, the plaintiffs should be directed to repay the sale price they received. It was found that there was no fraud on their part by reason of any misrepresentation by them as to their age at the date of the conveyance. The learned Judge has held that the plaintiffs can recover the properties as the sale was void and that they need not repay the sale price which they got as a condition precedent to their obtaining the relief in the case. It is not clear from the report whether the plaintiffs asked for the cancellation of the sale-deed executed by them on the ground of its void nature. If they had asked for it, it seems fairly clear that the Court would have power under S. 41 of the Specific Relief Act to direct the return of the purchase money. There can be no doubt that they can ignore the sale-deed as it was void and were entitled to recover possession of the properties sold. If this were the course adopted by the plaintiffs, the terms of the section would not strictly apply, as the learned Judge has pointed out, though it may be a question whether the matter should be made to depend on a trick in pleading. In this connection reference may be made to *Limbaji Ravji* v. *Rahi*[1] where a sale was made on behalf of a minor by a person who was not his legal guardian and when a suit was brought to recover the property, a condition was imposed on the plaintiff to return the consideration money received by him. To a similar effect is the decision in *Kapura* v. *Hardit Singh*.[2] With regard to these cases, however, it must be observed that, strictly speaking, if the plaintiff seeks to recover possession ignoring the sale, he does not ask for any equitable relief and therefore the rule that he who seeks equity must do equity has no application; and any question of seeking equity would arise only if he asks for cancellation of the sale-deed. Even with regard to this rule of equity, Lord Justice Romer observed in

1. (1925) I.L.R. 49 B. 576.
2. A.I.R. 1923 Lah. 510: 75 I.C. 261.

Thurstan v. *Nottingham Permanent Benefit Building Society*[3] that it has no application to cases where the transaction has been declared by the legislature to be void. It may well be doubted when the statement of the rule by the learned Judge is consistent with the terms of section 41 of the Specific Relief Act read with section 39, if it is assumed that these sections only enact the English rules of equity and do not depart from them to any extent.

If, in the present case, the plaintiffs were guilty of a fraudulent representation as to their age, the learned Judge would apparently have directed the return of the purchase money. There is ample authority for this view. See *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*,[4] *Koduri Venkataramayya* v. *Thumuluri Punnayya*[5] and *Rang Ilahi* v. *Mahbub Ilahi*.[6] There are observations to the same effect by Lord Justice Romer in the case of *Thurstan* v. *Nottingham Permanent Benefit Building Society*[3] and also in *R. Leslie, Limited* v. *Sheill*.[7] If, as pointed out in the last case, a minor is not liable in damages for a fraudulent representation as to his age, it is open to question whether when he seeks to enforce a remedy at law, such as possession of land, he is bound to restore the purchase money and if so on what principle.

YACUBKHAN *v.* GULJARKHAN, I.L.R. 52 Bom. 219.

The learned Judges have held in this case following *Motilal* v. *Kasambhai*[8] that the definition of the term "attest" in the Transfer of Property Act as enacted by Act XXVII of 1926 is retrospective by reason of the provisions of Act X of 1927. It can hardly be denied that its retrospectivity was intended by the legislature, though in carrying out the intention the legislature has not been happy in the use of appropriate language. Indeed, the relevant provisions of the enactments are so confused that a Division Bench of the Madras High Court in *Palaniappa Chettiar* v. *Rajagopala Pandarathar*[9] has gone the length of holding on an examination of their provisions that the legislature has not achieved its purpose and that the definition of the

3. (1902) 1 Ch. 1 at 12.
4. (1917) 7 L.W. 124.
5. (1925) 23 L.W. 521.
6. (1925) I.L.R. 7 Lah. 35.
7. (1914) 3 K.B. 607.
8. (1927) 29 Bom. L.R. 1334.
9. (1928) M.W.N. 425: 111 I.C. 407.

term "attest" in Act XXVII of 1926 has no retrospective operation notwithstanding the enactment of Acts X of 1927 and XII of 1927. A Full Bench of the Madras High Court has since held that the definition clause is retrospective in its operation, see *Veerappa Chettiar* v. *Subrahmania Aiyar.*[1] The learned Chief Justice has however not given any reasons for this view or cared to examine the reasons given by the learned Judges in *Palaniappa Chettiar* v. *Rajagopala Pandarathar,*[2] but has contented himself with the observation that this latter case was unreported and it was therefore unnecessary to express any opinion on its correctness. This observation of the Chief Justice is unintelligible as a decision does not derive its authority only when it is reported. Since then, however, the decision of the Division Bench has found its way into two legal journals. Again, the learned Chief Justice is not correct when he says that Odgers, J., had no doubt about the answer to the question, as that learned Judge had been a party to and held the contrary view in *Palaniappa Chettiar* v. *Rajagopala Pandarathar.*[2] It must however be recognised that the decision of the Full Bench is in accordance with *S. M. A. R. A. L. Firm* v. *R. M. M. A. Firm*[3] and the decision under notice and gives effect to the intention of the legislature. A further point decided by the Madras Full Bench and which has to be noticed is that the signature of the Registering Officer in the course of registration of a document may itself amount to attestation within the definition of the term, a view for which there is prior authority in *Radha Mohan Dutta* v. *Nripendra Nath Nandy.*[4]

JEWAN LAL DAGA *v.* NILMANI CHAUDHURI, I.L.R. 7 Pat. 305: 55 I.A. 107: 54 M.L.J. 325 (P.C.).

An agreement to execute a mortgage over specified properties to secure the true amount of the existing indebtedness between the parties, on a just and true account being taken, is according to the decision of their Lordships in this case, one capable of being specifically enforced. Nor is the fact that the plaintiff tendered a mortgage deed in which the amount of the mortgage is overstated by itself sufficient to deprive the plaintiff of all right to relief. The Court will in such circumstances ascer-

1. (1928) 55 M.L.J. 794 (F.B.).
2. (1928) M.W.N. 425: 111 I.C. 407.
3. (1927) I.L.R. 5 Rang. 772.
4. (1927) 47 C.L.J. 118: 105 I.C. 422.

tain the true amount due and settle the terms of the mortgage bond to be executed. It should be noticed that this in no way conflicts with the general statement of the law that the Court will not specifically enforce an agreement to lend or borrow. The English and Indian decisions are clear that where the amount has already been advanced in full, the Court will and must in proper cases grant a decree for specifically enforcing the agreement to give a mortgage. There has been a difference of opinion where only a portion of the agreed amount has been paid. The whole matter is fully discussed in the judgment of the Madras High Court in *Meenakshisundara Mudaliar* v. *Ratnasami Pillai.*[1]

Another important point is also decided by their Lordships in the case under notice. Their Lordships hold that documents which are not admissible in evidence can nevertheless be used by a witness while under examination to refresh his memory under S. 159 of the Indian Evidence Act, provided the terms of that section are satisfied. *See* on this point *Birchell* v. *Bullough.*[2] In *Banwari Lal* v. *Mahesh*[3] a witness was allowed to refresh his memory by reference to a horoscope as a record made by him, though it was not a probative document in itself.

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1. (1918) I.L.R. 41 M 959 : 35 M.L.J. 489 2. (1896) 1 Q.B. 325.
3. (1918) L.R. 45 I.A. 284 : I.L.R. 41 A. 63 (P.C.).

TAMIZ-UN-NISSA *v.* SYED MUHAMMAD HUSAIN, I.L.R. 50 All. 306.

In this case a usufructuary mortgagee purchased the equity of redemption from one of the heirs as if it belonged solely to him. Another co-heir brought a suit for her share of the property and as the mortgagee omitted to raise the defence based upon his usufructuary mortgage a decree was passed in favour of the plaintiff for her share. On the basis of the decree, the Revenue Courts entered the name of the plaintiff in that suit and other co-heirs in the Revenue records and the mortgagee then brought a suit for the recovery of the property from all the co-sharers on the footing of the usufructuary mortgage. This suit was in the Sub-Court, whereas the former suit was in the Munsif's Court. The question was whether the previous suit barred the present. Their Lordships took the claim against each of the co-heirs as distinct and on that footing held that the suit in respect of the share if brought separately could be brought in the Munsif's Court and would have been barred by *res judicata* and consequently this suit was also barred. This case illustrates one of the difficulties presented by section 11, Civil Procedure Code. Somewhat similar questions arose in *Pathumma* v. *Salimamma*[1] where the decision of the Munsif's Court as to the validity of the gift in a suit brought in respect of part of the land was held to bar a subsequent suit brought for the whole of the land in so far as the particular part in question in the previous suit was concerned. This view has been more recently accepted in *Raman* v. *Raman Bhattathripad.*[2] On a slightly different principle proceeds *Bhagwanbutti Chowdhrani* v. *Forbes,*[3] where it was held that the plea of *res judicata* cannot be defeated by combining the previous claim with another claim so as to change the Court. This case was distinguished in *Shibo Raut* v. *Baban Raut,*[4] where in a previous suit in respect of a part of the land the plaintiff in the second suit had been held to have no title, that decision was held not to operate as *res judicata* in a subsequent suit for joint possession of the latter's share in that and other lands on the ground that there was no joinder of causes of action in this case as in the previous and therefore no evasion and S. 11 should

1. (1884) I.L.R. 8 M. 83
2. (1915) 28 M.L J. 184.
3. (1900) I.L.R. 28 C 78
4. (1908) I.L.R. 35 C. 353.

be given effect to. In *Ranganatham Chetty* v. *Lakshmi Ammal*[2] the principle of the decision in *Bhagwanbutti Chowdhrani* v. *Forbes*[3] is adopted to defeat the subsequent suit of the plaintiff in the High Court as regards the whole of the property because in respect of half of it it had been already decided in an earlier suit in the City Civil Court that the defendant and not the plaintiff was the owner because in so far as half was concerned, the suit was within the competence of the City Civil Court. White, C.J., says in respect of this point at p. 384: "It seems to me that there are two principles recognised in these authorities. One is the plaintiff cannot add causes of action to what I may call the original cause of action for the purpose of swelling the amount of valuation and then say, 'the original Court is incompetent to try this question.' That seems to be the principle on which the case of *Bhagwanbutti Chowdhrani* v. *Forbes*[3] is decided. The other principle is shown in *Pathuma* v. *Salimamma*,[1] *David* v. *Girish Chunder Guha*[6] and *Sheorajrai* v. *Kashinath*[7] and the principle there stated, as I understand it, is that for the purpose of dealing with this question of *res judicata*, it is open to the Court to split up, so to speak the causes of action in the subsequent suit and if it be found that one of the causes of action is the same as the cause of action relied upon in the earlier suit, then although taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court." Here His Lordship is referring only to the joinder of different causes of action. The case he had to deal with does not seem to be a case of a joinder of causes of action but rather like *Shibo Raut* v. *Baban Raut*[4] a cause of action and part of a cause of action. *Pathuma* v. *Salimamma*[1] would seem to proceed on a ground narrower than these as pointed out by Sadasiva Aiyar, J., in *Raman* v. *Raman Bhattathripad*[5]: "The distinction between the competency of a Court to decide on the subject-matter directly in issue and the competency of the same Court to decide finally all the questions of fact and law which have to be decided in order to arrive at the decision on the title to the subject-matter." The decisions on such questions of fact and law will not be *res judicata* if the subject-

1. (1884) I.L.R. 8 M. 83
2. (1915) 28 M.L.J. 184
3 (1900) I L R 28 C. 78.
4. (1908) I L R. 35 C. 353
5 (1913) 25 M.L.J. 379
6. (1882) I.L R. 9 C. 183.
7. (1884) I.L.R. 7 A. 247 (F.B.).

matter of the subsequent suit was beyond the jurisdiction of the Court which decided the first suit. Mr. Justice Mukerjee seems to think that some of the observations at any rate in *Pathumma* v. *Salimamma*[1] are based upon the law as it was understood to be under the Code of 1877. Thus the point can hardly be said to be beyond doubt.

ASHIQ HUSAIN *v.* CHATARBHUJ, I.L.R. 50 All. 328.

In this case a simple mortgage contained a stipulation that if the mortgagor transferred the property, the mortgagor should be at liberty to sue for the mortgage money immediately. The mortgagee brought the suit 12 years after one such alienation but within 12 years of the time fixed in the mortgage. The question was whether the suit was barred. Reliance was placed on *Shib Dayal* v. *Meharban*[2] and *Gaya Din* v. *Jhumman Lal*[3] which hold that where it is provided in the mortgage deed that if interest was not paid regularly the mortgagee should be at liberty to sue for both the principal and interest, limitation begins to run from the date of default in respect of interest. Their Lordships distinguish the case under review from the Full Bench cases on the ground that there the ground of action was peculiarly within the knowledge of the mortgagee whereas here the plaintiff had no knowledge of the alienation. This is undoubtedly a distinction on facts but hardly involves a difference in principle. If section 18 applied, that is to say, if knowledge of plaintiff's right was fraudulently withheld from him the cause of action might be put off, but where no such fraud is established it is difficult to see how the starting of limitation could be put off.

CHATARBHUJ *v.* HARNAND LAL, I.L.R. 50 All. 335.

In this case the High Court interfered with the order of the Lower Court refusing to appoint a guardian to a person who was alleged by reason of unsoundness or infirmity of mind unable to protect his own interests under section 151 of the Code of Civil Procedure. The Allahabad High Court having taken the view that section 115 does not apply to interlocutory orders is compelled to call in aid section 151 to interfere when there has been "abuse of process" as they call in interlocutory matters. The ground of interference was that the Court had considered

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1. (1884) I.L.R. 8 M. 83.
2. (1922) I.L.R. 45 A. 27.
3. (1915) I.L.R. 37 A. 400 (F.B.).

itself bound by the finding of the District Court under the Lunacy Act that the party was not unable to manage his affairs by reason of unsoundness of mind. Their Lordships point out that the scope of Order 32, Rule 15 and of the Lunacy Act are not co-terminus in that the Lunacy Act has got to do only with incapacity to manage by reason of unsoundness of mind, while the Civil Procedure adds a further ground of incapacity to protect his own interest by reason of infirmity of mind whatever that may mean.

BALMUKAND *v.* TULA RAM, I.L.R. 50 All. 394.

The question in this case was whether the right to a share in the offerings at a temple is assignable. It is quite true, as their Lordships point out, that when the right to offerings is not connected with any religious office the objection of public policy to the transfer goes and the only question that remains is whether it is property at all to be assigned. It is difficult to assign a legal origin to the right to share in such offerings which is unconnected with an office and a permanent right (*Venkatarama Aiyangar* v. *Kasturiranga Aiyangar*[1]) whatever it may be as regards offerings at mosques. The offering is to the deity and it is difficult for any person to establish title thereto except as remuneration possibly for service as trustee or archaka. That is the view taken in *Kashi Chandra* v. *Kailash Chandra*,[2] *Sukh Lal* v. *Bishambar*,[3] *Puncha Thakur* v. *Bindeswari Thakur*[4] and *Puncha Thakur* v. *Bindeswari Thakur*[5] and that we think is the right view. If the right could be supported on some other legal basis unconnected with any office, then the only question would be whether it can be said to be property. If it is connected with some original right to the property there could be no doubt it would be property. Even otherwise, it would be some sort of customary right in the shrine and may be assignable. There are certain cases, for instance, *Kashi Chandra* v. *Kailash Chandra*,[2] which took the view that these offerings were voluntary and uncertain and therefore there could be no claim in respect of them but that view is not accepted in Madras in *Bheema Charyulu* v. *Ramanuja Charyulu*.[6]

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1 (1916) I.L.R. 40 M. 212 at 219 31 M.L.J. 777 (F.B).
2. (1899) I.L.R. 26 C. 356
3. (1916) I.L.R. 39 A. 196
4. (1915) I.L.R. 43 C. 28
5. (1916) 37 I.C. 960
6. (1907) 17 M.L.J. 493.

RAMAPPA *v.* YELLAPPA, I.L.R. 52 Bom. 307.

In this case, the equity of redemption in certain properties under a possessory mortgage was vested in three brothers, two of whom agreed to sell the properties to the mortgagee but no registered sale-deed was executed. The other brother afterwards sued to redeem the entire properties and not merely his share in them and the mortgagee contended that by the doctrine of part-performance he had become the owner of the shares of the two brothers who had agreed to sell their interests and that therefore the plaintiff was entitled to redeem only his share of the properties. The learned Judges have upheld the defendant's contention. As pointed out by the learned Judges in this case, the rule of part-performance has been recognised by the Indian High Courts even with reference to the transfers which can only be effected in accordance with the formalities required by the Transfer of Property Act. This conclusion has been rested mainly on the observations of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli*[1] based on *Maddison* v. *Alderson.*[2] Had it not been for the recent decision of the Privy Council in *Arseculeratne* v. *Perera,*[3] it might not have served any useful purpose to point out the difference between the scope of section 4 of the Statute of Frauds and the sections of the Transfer of Property Act, that in the one case, the existence or validity of the contract does not require the formality of writing, but writing is only required for *proving* an existing and valid contract, *Leroux* v. *Brown*[4] and *Rochefoucauld* v. *Boustead,*[5] while in the case of transfers requiring certain formalities under the Transfer of Property Act, the transfers themselves cannot exist in law unless the formalities are complied with. The Ceylon ordinance in the case before the Privy Council required that no agreement for the sale, transfer or mortgage of land would be of force or avail in law unless it was in writing signed and attested by a notary and two witnesses. An agreement affecting land was purported to be made in writing but without the other formalities required by the ordinance and the doctrine of part-performance was invoked by the appellant and the decision in *Maddison* v. *Alderson*[2] was cited before their Lordships in support of the contention. But their Lordships held that the doctrine of part-performance with

1. (1914) I.L.R. 42 C 801: L.R. 42 I.A. 1: 28 M L.J. 548 (P.C.).
2. (1883) L R. 8 A.C. 467
3. (1928) A.C. 173.
4. (1852) 12 C B. 801.
5. (1897) 1 Ch. 196 at 207.

reference to section 4 of the English Statute of Frauds had no application to the stringent provisions of the Ceylon ordinance by which an agreement as to land was of no force or avail in law unless clothed in the formalities required by the ordinance. It may well be doubted whether the provisions of the Transfer of Property Act do not have the same legal effect as the provisions of the Ceylon ordinance. When therefore the question comes up for consideration in a later case, it is open to argument whether having regard to the decision of the Privy Council in *Arseculeratne* v. *Perera* the extension of the doctrine of part-performance to the cases of transfers falling under sections 54, 59, 118 and 130 of the Transfer of Property Act is not unwarranted.

BENOY KRISHNA MUKERJEE *v.* SATISH CHANDRA GIRI, I.L.R. 55 Cal. 720: 54 M.L.J. 423 (P.C.).

An appeal was taken in this case to the Privy Council against an interlocutory order appointing a receiver in the course of a suit pending in a moffussil court. That such an order is not a "final order" within the meaning of the expression as used in section 109, clauses (*a*) and (*b*) of the Civil Procedure Code is well settled and a party is not therefore entitled as of right for leave to appeal to the Privy Council under those clauses. See *Chundi Dutt Jha* v. *Pudmanund Singh Bahadur*,[1] *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji*[2] and *Magni Ram Bungar* v. *Sridhar Choudhury*.[3] A final order has been understood to mean an order which finally adjudicates any matter directly at issue in the suit in respect of the rights of the parties. *Secretary of State for India in Council* v. *British India Steam Navigation Company*.[4] Apparently, therefore, leave to appeal was given in the case under clause (*c*) of the section as being a case otherwise fit for appeal to His Majesty in Council. Their Lordships have clearly noticed the futility and even mischief of an appeal being taken to the Privy Council in interlocutory matters as a rule.

This decision is further useful as enunciating the conditions under which alone a receiver can be appointed pending a suit. Their Lordships draw attention to the undesirability of indulging in a discussion of the merits of the suit on the materials then available in an application for the appointment

1. (1895) I.L.R. 22 C 928.
2. (1911) 13 C.L.J. 507.
3. A.I.R. 1925 Pat. 173.
4. (1911) 13 C.L.J. 90.

of a receiver and therefore refrain from doing so. While no doubt in cases where the defendant is in possession of the suit properties under an apparent title, the Courts will expect the plaintiff to make out a fair case before dispossessing the defendant by the appointment of a receiver as distinguished from the class of cases where the properties are *in medio*, even a tentative expression of opinion on the merits of the suit by the court might as their Lordships observe be embarrassing to one or other of the parties at a later stage of the suit and should therefore be avoided.

PHANINDRA KRISHNA DUTT *v.* PRAMATHA NATH MALIA, I.L.R. 55 Cal. 748.

The learned Judges have, in the course of the judgment in this case, drawn pointed attention to the rules of procedure contained in rules 7 and 8 of Order 26 of the Civil Procedure Code which impose certain conditions before the evidence of a witness taken on commission can become evidence in the suit and the necessity for observing them. Once the Court has ordered the evidence of a witness to be taken on commission on being satisfied that it is a fit case for the issue of a commission, it is generally assumed that the evidence so taken will be evidence in the suit without any further formality and without any evidence that at the time of the trial, the case satisfies the requisites of Rule 8 of Order 26 and without the formality of reading the evidence so taken at the trial. Indeed, there are observations by learned Judges that it is not the practice in the moffussil Courts of Bengal to observe strictly the provisions of those rules. *Dhanu Ram Mahto* v. *Murli Mahto*[1] and *Man Gobinda Chowdhuri* v. *Shashindra Chandra Chowdhuri*.[2] If that was the practice, after the observations of the Privy Council in *Satish Chandra Chatterji* v. *Kumar Satish Kantha Roy*,[3] the Courts have to give effect to the rules of procedure contained in the Code and not treat them as "an idle formality." It may be noticed that ever since the Civil Procedure Code of 1859, provisions corresponding to Order 26, Rule 8 have been enacted in the Civil Procedure Codes of this country and a similar rule was in force in England at least from 1 William IV, Ch. 22, S. 10 which with some slight alteration is Rule 18, Order 37 of

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1. (1909) I.L.R. 36 C. 566. 2. (1907) I.L.R. 35 C. 28.
3. (1923) 45 M.L.J. 363 (P.C.).

the Rules of the Supreme Court. Cf. *Duke of Beaufort* v. *Crawshay*.[4] But the more important question is what is to be the result if a witness or party is examined on commission and the party on whose behalf he is so examined declines to tender the deposition taken before the commissioner at the trial, though the conditions referred to in Rule 8 exist. Is it then open to the other parties to read it at the trial and thus make it evidence in the suit on the side of the party calling the witness? The practice on the Original Side of the Calcutta High Court seems to be that unless the party who called the witness tenders the deposition at the trial, it cannot become evidence in the suit and that it is not open to the other parties to tender the deposition in evidence. *Kusum Kumari Roy* v. *Satya Ranjan Das*[5] and *Hemanta Kumari* v. *Banku Behari Sikdar*.[6] Unless this rests on a rule of practice applicable to the Original Side of the Court, there does not seem to be anything in the Civil Procedure Code to prevent the other parties reading it in evidence provided, of course, the requisites of Order 26, Rule 8 are satisfied. We venture to think that the decisions in *Man Gobinda Chowdhuri* v. *Shashindra Chandra Chowdhuri*,[2] *Rajah Prithee Bullubh Pal Sreechundum Mari Sultan* v. *Hara Dhun Shome*[7] and *Dwarakanath Dutt* v. *Gunga Dayi*[8] have only to be understood in this light. There is also a direct decision to this effect of the Sind Judicial Commissioner's Court in *Chotumal Bulchand* v. *Lilaram Lakhmichand*.[9]

MUHAMMAD SHOAIB KHAN *v.* ZAIB JAHAN BEGAM, I.L.R. 50 All. 423.

The right of a Muhammadan widow to remain in possession of her husband's estate of which she has got into possession and the incidents of such right have been the subject of various decisions and the point that arose in this case was whether to have this right, she should have got into possession in the assertion of her right as creditor. Their Lordships say that it is not necessary—all that is required is that she should have got into possession without force or fraud.

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2. (1907) I.L.R. 35 C. 28.
4. (1866) L.R. 1 C.P. 699.
5. (1903) I.L.R. 30 C. 999.
6. (1905) 9 C.W.N. 794.
7 (1874) 22 W.R. 331
8. (1872) 8 Ben. L.R. (App.) 102.
9. A.I.R. 1926 Sind 34.

THAKARDWARA PHERU MAL v. ISHAR DAS, I.L.R. 9 Lah. 588.

An idol under Hindu Law is no doubt a juridical person capable as such of holding property though it is only in an ideal sense that property is so held. It is clear however as pointed out by the Privy Council in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*[1] that possession and management of the dedicated property properly belongs to the shebait. A right of suit for protection of the idol's property is however vested in the shebait and not in the idol. In the later case of *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[2] their Lordships while discussing the true view in Hindu Law of a family idol speak of it "as a 'juristic entity' which has a judicial status with the power of suing and being sued." It is however clear that this can be the case only of the deity represented by the consecrated image. The building in which the idol itself is located or any other religious building alone cannot itself be regarded as a legal persona. Such a thing cannot be a plaintiff in an action, even if the plaint purports to be represented by a person describing himself as a manager. The building is itself the subject-matter of property and it is only the legal owner thereof who can institute a plaint in respect thereof as owner.

A religious *institution* may however stand on a different footing. As observed by West, J., in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram*[3] "The Hindu Law, like the Roman Law and those derived from it, recognises not only corporate bodies with rights of property vested in the corporation apart from its individual members but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it . . . A trust is not required for this purpose." The conception of "corporations sole and aggregate" is not foreign to Hindu Law as shown by Justice Bashyam Aiyangar in his judgment in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*,[4] although the analogy of a madhathipathi with a bishop as developed by the learned Judge has not been accepted as accurate in all respects. There have been differences of opinion as to what exactly should be regarded as the ideal person in the case of temples and mutts. It has been

1. (1904) L.R. 31 I.A. 203: I.L.R. 32 C. 129 (P.C.).
2 (1925) L.R. 52 I.A. 245: I.L.R. 52 C. 809: 49 M.L.J. 30 (P.C.).
3. (1887) I.L.R. 12 B. 247.
4. (1904) I.L.R. 27 M. 435.

suggested that the whole community for whose benefit the institution is founded and endowed should be regarded as the true legal persona. So far as temples are concerned it must be taken as well-established that it is the deity who is the juristic person. So far as mutts are concerned it has been suggested that the office of the spiritual preceptor is the true juristic person. The view has also been advanced that the objects for which the mutt is founded or the deity that is usually worshipped in the mutts or the mutt itself may well be regarded as the artificial persona recognised by the law. The Privy Council speak of the head of the mutt as the person in whom the whole assets are vested as the owner thereof in trust for the institution. See *Ram Parkash Das* v. *Anand Das.*[5] As regards what may be called charitable endowments as distinguished from religious endowments there has been very little judicial discussion as to what should be considered to be the true 'persona'. In an early case in *Parmanandas Jivandas* v. *Venayek Rao Wassudeo*[6] the Privy Council remark that "the true owners of the property given to the Dharmasala are the objects of the trust, *viz.*, the sadhus and the saints for whose benefit the fund was given in that case." In the case under review, the facts are not clear as to the exact nature of the "Thakardwara" which was put forward as the plaintiff in the action. If it was merely the building in which an idol has been installed and located, it is clear that the building cannot be regarded as a juristic person along with the deity. The judgment should not be taken to lay down that so far as religious endowments are concerned only an idol and a mutt can be taken to be established as juristic persons or that there cannot be any other kind of artificial persona recognised as such by Hindu Law.

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5 (1916) L.R. 43 I.A. 73: I.L.R. 43 C. 707: 13 M.L.J. 1 (P.C.).
6 (1878) L.R. 9 I.A. 86: I.L.R. 7 B 19 (P.C.).

CHUNNA MAL-RAM NATH *v.* MOOL CHAND-RAM BHAGAT, L.R. 55 I.A. 154: I.L.R. 9 Lah. 510: 55 M.L.J. 1 (P.C.).

Section 63 of the Indian Contract Act is a deliberate departure from the rules of the English Common Law. Not only is no "consideration" necessary as has been laid down by all the High Courts, but even an "agreement" is, according to the decision of their Lordships in this case, not an essential condition. The contrary view of Jenkins, C.J., in *Abaji Sitaram Modak* v. *Trimbak Municipality*[1] is declared by their Lordships to be wrong. There need be no "accepted proposal" for the validity of a remission of performance by a promisee. In such a case where performance has been dispensed with, the promisee can no longer claim damages for non-performance of the promise.

In the particular case, the defendant's offer to deliver the goods packed in bales, instead of in tin-lined boxes was not accepted by the plaintiff who thereupon cancelled the contract. Their Lordships found it unnecessary to decide if the requirement as to packing in tin-lined boxes was a part of the description of the goods. If it were not, the plaintiff had no right to cancel the contract and having dispensed with performance as offered could not claim damages for non-delivery. If it were, the contract had become void under S. 56 as owing to the subsequent order of the Government prohibiting import of cotton goods packed in wood and tin cases. The plaintiff cannot in either view claim damages.

E. MYLNE *v.* T. KOIR, I.L.R. 6 Rang. 323.

This case affords a telling illustration of the mischiefs of uncertainty in the Law of Procedure. After the framing of the issues, and recording of some evidence led by the defendant—on whom the burden of proof lay—the suit was adjourned by the Court. On the adjourned date, the defendant was absent and his pleader asked for an adjournment, which was refused, and he withdrew from the case. The Judge proceeded with the trial, examined some witnesses for the plaintiff and later delivered judgment in plaintiff's favour on the merits. Failing in an application to set aside the *ex parte* decree, the defendant appealed to the District Court against the *ex parte* decree, as well as against the order refusing to set it aside. The appeal against the order was dismissed on the ground that the pleader having been present, the decree was not *ex parte*. The appeal against the decree was allowed and the suit remanded.

1. (1903) I.L.R. 28 B. 66.

Against this remand order, the plaintiff moved the High Court which held that the last adjournment having been made *suo motu* by the Court, Rule 3 of Order 17 will not apply, and that the pleader having withdrawn, the case fell under Order 17, Rule 2 and Order 9, Rule 6. In the result, the appeal was allowed and the defendant left without any remedy.

It does not clearly appear from the judgment if the appeal against the order refusing to set aside the *ex parte* decree was dismissed on the plaintiff's plea that Order 17, Rule 2 will not apply or the Court of its own accord found the point. If it were at the instance of the plaintiff that the appeal was dismissed, it is at least doubtful if the Court could have allowed the plaintiff to contend in the appeal to the High Court that O. 17, R. 3 did not apply but only O. 17, R. 2. He successfully caused the defendant's petition to be dismissed on that plea. Whatever may be said on that question, it is difficult to follow the learned Judge when he says "That Order, however, is not before me now". The powers of revision of the High Courts are very wide and the High Court can of its own motion act under Section 115, Civil Procedure Code, if it appears to it desirable so to do; and it is not necessary that it should be put into motion by the party aggrieved (See *Sri Krishna Thathachariar* v. *Singarachariar*[1], *Puran Mal* v *Janki Pershad Singh*[2], *Golam Mahammad* v. *Saroda Mohan Maitra*[3], *Zamiran* v. *Fateh Ali*[4], *Debi Das* v. *Ejaz Husain*[5] and *Chowdhury Ram Prasad Rai* v. *Mahesh Kant Chowdhury*[6]). The defendant by the District Judge's order got what he desired and it was not necessary for him to have preferred a revision against the order dismissing his appeal against the order refusing to set aside the *ex parte* decree.

It appears from the judgment that the prior adjournment was by the Court and not at the instance of the party. In that event, it is doubtful if Order 17, Rule 2 will apply. (See *Sreemutty Toolsy Money Dassee* v. *Sreemutty Prasad Money Dassee*[7]), though in several cases it has been assumed that it will. (Cf. *Bhatiley Chunilal* v. *Chakarpan*[8]; *Enatullah Basunia* v. *Jiban Mohan Roy*[9].)

1. (1881) I.L.R. 4 Mad. 217
2. (1901) I.L.R. 28 C 680.
3. (1900) 4 C.W.N. 695
4. (1904) I.L.R. 32 C 146
5. (1905) I.L.R. 28 All. 72
6. (1921) I.L.R 1 Pat. 232.
7. (1898) 2 C.W.N. 490.
8. (1917) 42 I.C 945
9. (1914) I.L.R 41 Cal. 956

THE SECRETARY OF STATE FOR INDIA *v.* VOLKART BROS., I.L.R. 51 Mad. 885 : 55 M.L.J. 646 (P.C).

In this case, the question was whether the assignee of the lessee's interest in a part of the lease-hold premises could sue to enforce in respect of that part, the covenant to renew the lease. There was considerable divergence of judicial opinion on this point in India. Their Lordships hold on the construction of the lease that the covenant was to renew the lease as a whole and could not therefore avail in respect of a part. Their Lordships leave the question open whether if all the persons interested were made parties and consented to the renewal, a renewal in respect of the whole could not have been enforced. In the case under review, it so happened that the assignee of the lease in respect of the other part had surrendered the lease in favour of the landlord. Their Lordships base their decision on the fact that the contract is a contract to renew the whole lease and not a contract to renew a part and such a contract according to their Lordships would not avail to each assignee of a part with respect to his part. Their Lordships adopt the reasoning of Mr. Justice Krishnan on this part of the case, viz., that "cases bearing upon the apportionment of rent or referring to covenants for repair are not in point as they are not *pari materia* with covenants to renew which create new rights." According to their Lordships the sole question is what is the contract—is it a contract to renew the lease in respect of the whole or is it a contract to renew the lease in respect of any part of it? If there is no contract to renew the lease for a part of the premises, then Section 14, 15 or 16 of the Specific Relief Act cannot save the situation and give the assignee a right to sue. If on the other hand the contract was a contract to renew in respect of each part, then those sections would have nothing to do with the case.

THIMMAPPA *v.* THIMMAPPA, - I.L.R. 51 Mad. 967 : 55 M.L.J. 351 (F.B.).

The Full Bench holds in this case in accordance with the opinion of the other High Courts that section 162 of the Criminal Procedure Code prohibits the use of not only statements made to the Police in the course of investigation and reduced to writing but such statements whether oral or written. His Lordship Mr. Justice Jackson points out the obvious unsatis-

factory results of the section being so interpreted but his Lordship thinks with the others that that is the better construction of the section. Mr. Justice Ramesam in his judgment which is the judgment that gives the reasons in support of this view, adopts the view of Rutledge, C. J., in *King-Emperor* v. *Maung Tha Din*[1] as regards the possible constructions that are open on the wording of the section. He therein indicates agreeing with Rutledge, J., that the section admits of two possible constructions, viz., first, that it prohibits the use of the statements as well as the record—secondly, that it prohibits the use of written statements. A possible third construction is, we should think, that it prohibits the use of the statements as well as the record when such statements have been reduced to writing and not otherwise. If the statements have been reduced to writing, neither oral evidence of such statement nor the writing can be given in evidence, except in the manner and in the circumstances permitted by the section. If the statements have not been reduced to writing evidence may be given of statements made. This construction would justify the use of the words "or any record thereof" and would meet the criticism of Mr. Justice Jackson. In the use of such statements, the Police would not be in a better position than the accused inasmuch as their acceptance would depend upon the credibility of the witnesses and not upon the additional guarantee of a written record by an officer at about the time and where it is against the accused, the accused would be very much assisted by the fact of its not having been taken down by the Police at the time if really the statement was made as deposed by the witness later.

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1 (1926) I.L.R. 4 Rang. 72.

MUTHUSWAMI KAVUNDAN *v.* PONNAYYA, I.L.R. 51 Mad. 815: 55 M.L.J. 436.

A Hindu died leaving a stepmother. She took possession of the estate and spent certain amounts for the marriage of her daughters and paid certain of the debts of her husband and stepson. She claimed a charge in respect of those amounts. Their Lordships hold that she was not entitled to it though she might be entitled to claim the same personally from the heir and that Art. 61 would be the article applicable to her claim. They opine that these allowances could have been claimed by her in the suit against her by the reversioner. That it can be pleaded is the view of the Allahabad High Court in *Sat Narain* v. *Radha Kishan*. Their Lordships held in this case that the possession of the stepmother could not be held to be wrongful so long as the reversioners did not make a claim. Undoubtedly she had a right to be maintained out of it and have her daughters married out of it. If nobody came forward to assume charge of the property and also assume responsibilities in connection with it, there is much in reason to justify the view that it would be right on her part to take possession at least of so much of the property as was necessary for the purpose of meeting those legitimate expenses. The Hindu law contemplates coparceners being held liable for the debts of even women and slaves contracted for the necessities of the family. It is difficult to conceive of a situation in which they could be more properly held liable than the one like the present.

In re VISVANADHA RAO, I.L.R. 51 Mad. 1006: 55 M.L.J. 442 (F.B.).

Their Lordships of the Privy Council have declared the rights of individuals to carry processions in highways, etc., to be subject to the Magistrate's directions "such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of public peace." *Mansur Hasan* v. *Muhammad Zaman*.[1] Section 144, Criminal Procedure Code, is thus recognised as justifying Magistrates overriding private rights of parties in times of emergency but to allow the Magistrates to suspend and override such rights for an indefinite length of time by successive orders or the Local Government to do the same by a notification in the Gazette is in effect to allow

1. (1924) I.L.R. 47 All 151: L.R. 52 I.A. 61: 48 M.L.J. 23 (P.C.).

the Government to abdicate its natural function to enforce private rights. While the High Court may have power to restrain the Magistrate's extravagant action, it may not have the power to do so when the Local Government chooses to exercise the power whimsically or tyrannically. In certain circumstances the party may have a right of action against Local Government but short of that he does not seem to have any remedy. The point of extravagance which might justify the High Court in interfering with the action of the Magistrate would vary with individual Judges. So far as this case is concerned, it does not deal with the question but there seems to be however a difference of opinion—as to whether orders passed under this section are not merely administrative orders and as such whether it is not beyond the competence of the High Court to interfere with such orders.

HITENDRA SINGH *v.* MAHARAJA OF DHARBANGA, L.R. 52 I.A. 197: I.L.R. 7 Pat. 500: 55 M.L.J. 615 (P.C.).

Having regard to the very elaborate judgments of the High Court which is reported in *Hitendra Singh* v. *Maharaja of Dharbanga*[1] and to the difference of views among the learned Judges and having regard to the various aspects of the decision therein, it is much to be regretted that the judgment of their Lordships of the ultimate Court should be so meagre even on the one question which they find sufficient to decide. The extracts from the two earlier decisions of their Lordships do not advance the discussion any further, as their Lordships merely reiterate their earlier observations. It is not at all clear whether their Lordships intend to hold that the decision of the Madras High Court in *Bhujanga Rao* v. *Ramayamma*[2] is overruled by the decision of the Privy Council in *Surajmani* v. *Rabi Nath Ojha*[3]. It was so understood by the Madras High Court in *Ramachandra Rao* v. *Ramachandra Rao*[4], but this judgment itself was reversed by the Privy Council in their decision in *Ramachandra Rao* v. *Ramachandra Rao*[5] though on another point. On the question as to what exactly was the *ratio decidendi* of their Lordships' decision in *Surajmani's case*[3] their Lordships observe in the latter case "As some misapprehension appears to exist as to the effect of cer-

1. (1925) I.L.R. 4 Pat. 510
2. (1884) I.L.R. 7 M 387.
3. (1907) L.R. 35 I.A. 17: I.L R. 30 A. 84: 18 M.L.J. 7 (P.C)
4. (1918) I.L.R. 42 M. 283: 36 M.L.J. 306.
5. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P.C.).

tain decisions of the Board, and notably *Surajmani* v. *Rabi Nath Ojha*,[3] their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the rights of a Hindu widow. In the case referred to, when originally heard before the High Court, it had been stated that under the Hindu Law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration." In view of the guarded statement as to the effect of the decision, it cannot be assumed that the decision in *Bhujanga Rao* v. *Ramayamma*[2] is wholly overruled. An estate of inheritance can be created in favour of a Hindu wife or widow by the terms of a gift of immoveable property by the husband though it may not be alienable. Heritability does not necessarily carry with it alienability. Although express power of alienation is not necessary still there must be words of sufficient amplitude in the terms of the gift itself to convey a right of alienation. In cases of ambiguity it is open to the Courts to rely on the personal law of the donee.

In the case under review, the question arose with reference to the construction of a deed of gift of immoveable properties (described as *hiba-bil-iwaz*) by a Hindu governed by the Mithila school of Hindu Law in favour of his wife. It was held by Das, J. in the High Court that, under the Mithila Law, a gift of immoveable property by the husband to his wife does not create an alienable estate in her, though the same may be heritable. He also held that the gift-deed itself did not confer on her an alienable estate. This view is rejected by the Privy Council which holds that the limitation on alienation by the Mithila law in the case of a gift by husband to wife applies exclusively to pure and simple gifts and not to gifts for consideration. Their Lordships also refer to Section 8 of the Transfer of Property Act in this connection. In the first place it is difficult to see what bearing the Transfer of Property Act of 1882 has with reference to the construction of the deed of gift which was of the year 1876. Secondly, their Lordships

2 (1884) I.L.R. 7 M. 387.

3. (1907) L.R. 35 I.A. 17· I.L.R. 30 A. 84: 18 M.L.J. 7 (P.C.).

have not apparently had in view the terms of section 2 of the Act which provides that the sections of the second chapter of the Act (sections 5 to 53) do not affect any rule of Hindu Law. It may be noted that Justice Seshagiri Aiyar relied on the terms of section 8 of the Transfer of Property Act in his judgment in *Ramachandra Rao* v. *Ramachandra Rao,*[4] but the Privy Council on appeal did not then consider that it affected the rule of construction with reference to gifts under Hindu Law. Their Lordships again do not refer to any authority for excluding gifts for consideration from the scope of the rule as stated

Nor is it clear if their Lordships intended to treat the transaction as really a sale having regard to their observation that a *hiba-bil-iwas* under the Muhammadan Law is treated as a sale and not as a gift. This latter statement again does not seem to be accurate if understood as applicable for all purposes. It may be that the particular decision on the terms of the document in question having regard to the surrounding circumstances is right, but the judgment of their Lordships is not illuminating and is likely to be misapplied. The statement of their Lordships in the concluding portion of their judgment "As they understand the Mithila Law, a simple and pure gift by the husband to the wife does not convey to her absolute ownership. She takes it only for her life without any right of alienation unless a power of alienation is expressly conferred on her" is again open to objection, as the qualification about express declaration of the power of alienation is opposed to their own decision in *Surajmani's case*[3] and to their clear statement of the effect of that decision in *Ramachandra Rao* v. *Ramachandra Rao,*[4] which must be equally applicable to all schools of Hindu Law.

It may be useful to add that the Privy Council recognise that under Hindu Law an estate may be heritable though not alienable. In the recent case of *Narsingh Rao* v. *Mahalakshmi Bai*[6] their Lordships quote with approval a passage from Mayne's Hindu Law and Usage, page 604, where the learned author discusses the nature of a saudayika gift of stridhanam properties. The further passage in the present edition of Mayne as to the correctness of *Bhujanga Rao* v. *Bhujanga Rao*[7] which differs from the previous edition on that point must, however, remain open to examination.

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3. (1907) L.R. 35 I.A. 17: I.L R 30 A 84 18 M.L.J. 7 (P.C).
4. (1918) I.L.R. 42 M. 283: 36 M.L.J. 306.
6. (1928) 55 M.L.J. 42 (P C)
7. 9th Ed., 397 at 664 8th Ed., 397 at 542.

K. S. E. MOHAMED CASSIM AND OTHERS *v.* JAMILA BEE BEE, I.L.R. 6 Rang. 334.

In this case, the learned Judges had to consider the application of Art. 182 of the Limitation Act to proceedings by way of execution against a surety and they follow the case *Narayan* v. *Timmaya*[1] without any independent discussion. Though *Narayan* v. *Timmaya*[1] has not been overruled by either a Full Bench or a higher tribunal and several cases have also followed it (*Yusuf Ali* v. *Papa Miya*,[2] C.M.S.A. No. 62 of 1913* and *Wasir Bukhsh* v. *Hira Ram*[3]), it has not been uniformly followed either. (*Muhammad Hafiz* v. *Muhammad Ibrahim*[4], *Badruddin* v. *Muhammad Hafiz*,[5] *Langtu Pande* v. *Baijnath Saran Pande*[6] and *Honda Ram* v. *Firm Seth Kanwar Bhan-Sukh Nand.*[7]) In *Langtu Pande* v. *Baijnath Saran Pande*[6] Rustomji says (Limitation Act, 4th edition, p. 1038, foot-note (i)) "it was assumed that an application against the surety would save time against the principal; apparently it was the case of a joint decree against the principal and surety." But it appears to be a case of a surety offered under section 336, Civil Procedure Code of 1882 (now sec. 55).

That the case does not fall within the words of Art. 182, *i.e.*, "a decree *passed* jointly" is conceded even in *Muhammad Hafiz* v. *Muhammad Ibrahim*,[4] but it is said that this is a case not contemplated by Explanation I to Art. 182. The Civil Procedure Code of 1908 was passed before the Limitation Act of that year and it may well be argued that if the legislature had intended to include the case of a surety (under section 145 of the Civil Procedure Code) in the Explanation to Art. 182, it would have said so. The Allahabad decisions discuss the question on general principles and it is open to question how far such discussion is permissible in construing an unambiguous section. There are some decisions also in Calcutta which seem to agree with the Allahabad decisions (see *Birendra Chandra Singha* v. *Tulsi Charan Ghose*[8]) except in cases where the surety makes himself liable, not for the performance of *the decree* but only for a fixed sum. It is difficult to see the distinction. There are several cases where a portion of the decree is joint and a portion several and though there is some apparent conflict in the deci-

1. (1906) I.L.R. 31 B. 50
2. (1923) I.L.R. 47 B. 778.
*(1914) M.W.N. (Jour.) 64.
3. (1921) 60 I.C. 265.
4. (1920) I.L.R. 43 A. 152 at 158.
5. (1922) I.L.R. 44 A. 743.
6. (1906) I.L.R. 28 A. 387.
7. (1922) 67 I.C. 301: A.I.R. 1922 Lah. 457.
8. (1924) 85 I.C. 657: A.I.R. 1926 C. 267.

sions as to whether it is *wholly* a joint decree or not, the better opinion seems to be that they are joint to the extent of the joint liability. (See *Nand Lal Saran* v. *Dharam Kirti Saran*,[9] *Kusaji* v. *Vinayak R. Parabhu*,[10] *Baroda Kinker Choudhury* v. *Babin Chandra Dutta*,[11] *Subramania Chettiar* v. *Alagappa Chettiar* by agent *Palaniappa Chetti*[12]).

The cases against *Narayan* v. *Timmaya*[1] argue (1) that an application against the judgment-debtor is a step-in-aid of the execution of the decree; (2) that *Narayan* v. *Timmaya*[1] is a case of a surety who had rendered himself liable even before the passing of the decree, for the due performance of the same; (3) that the decree does not distinguish portions of the subject-matter as payable or deliverable by the judgment-debtor and the surety respectively, but that it affects the judgment-debtor alone and only by reason of section 145 becomes executable against the surety; (4) that the Bombay High Court has distinguished *Narayan* v. *Timmaya*[1] in *Cholappa* v. *Ram Chandra*.[13] The first argument overlooks the fact that Art. 182, cl. (5) will come in only "where the application next hereinafter mentioned has been made" and that takes in Explanation I, in which case it will be begging the question at issue to say that an application to execute the decree (against the judgment-debtor) will avail as a step-in-aid as against the surety. Even in cases not coming under Explanation I, an application put in by the decree-holder against one of the judgment-debtors will be in aid of the execution of the decree but the question is if it will be so *against the others*. In some cases it has even been held that when mention is made of the surety's liability in the execution petition, but no relief is specially asked for against him, it will not avail to save limitation against him, *Honda Ram* v. *Firm Seth Kanwar Bhan-Sukh Nand*[7]; and it is so even though notice of such petition is served on the surety, for the notice only tells him that the judgment-debtor was being proceeded against, a matter of no concern to the surety. It is but fair that the surety must be informed that the decree-holder continues to look to him for payment and the delay in executing the decree against the judgment-debtor may mean additional burden thrown on the sureties, for, events not contemplated by the surety at the time he offered himself as surety may happen,

1. (1906) I.L.R. 31 B 50 7. (1922) 67 I.C. 301: A.I.R. 1922 Lah. 457.
9. (1925) I.L R. 48 A 377. 10 (1898) I.L.R. 23 B. 478.
11. (1909) 11 C.L.J. 83. 12 (1906) I.L.R. 30 M. 268.
13 (1919) I.L.R. 44 B. 34.

thereby seriously jeopardising his remedies as surety against the judgment-debtor.

It is difficult to follow the second of the arguments summarised above. So long as the surety is not *eo-nomine* a party to the decree, all sureties must be proceeded against only under section 145, Civil Procedure Code, whether they became sureties before the decree or after it (*e. g.*, a surety in cases of arrest before judgment under O. 38, R. 2, C. P. C.).

There is much force in the third, but with due respect to the learned Judges, it does not meet the difficulty in the case. It cannot be denied that the surety is jointly and severally liable with the judgment-debtor and it is on that ground that it has been held that if a surety is a party to the suit and a decree is passed against him as well, he is a joint judgment-debtor within the meaning of Art. 182, Explanation I. (See *Yinke Supaya* v. *Maung Kin*,[14] *Honda Ram* v. *Firm Seth Kanwar Bhan-Sukh Nand*,[7] *Aya Ram Tola Ram* v. *Hit Ram Bhoj Raj*[15]). In an early case in *Hurkhoo Singh* v. *Baboo Ram Kishen*[16] the question was discussed on principle. (There was then no section corresponding to section 145, Civil Procedure Code). There a surety agreed that, on failure of the debtor to pay the debt, he would pay it and that it may be enforced in execution against him. The creditor tried to execute the decree against the surety more than three years after the decree, after exhausting all his remedies against the principal debtor. The learned Judges held that the surety's liability was a separate responsibility—not joint—and that the decree was barred as it was not kept alive against him (surety) by proceedings, irrespective of those taken against the judgment-debtor.

The contrast in Explanation I also is between a decree distinguishing portions of the subject-matter as payable or deliverable by each and a decree passed jointly against more persons than one. That indicates that where the decree does not distinguish portions of the subject-matter as respectively payable or deliverable by each, the decree is to be deemed to have been jointly passed against all of them. But this does not answer the difficulty of *Narayan* v. *Timmaya*[1], *viz.*, that it is not passed against them all. Section 145, Civil Procedure Code, only creates a statutory liability on the part of

1 (1906) I.L.R. 31 B 50

7. (1922) 67 I.C. 301: A.I.R. 1922 Lah. 457.

14. (1920) 60 I.C. 23: 3 U.B.R. (1920) 261.

15. A.I.R. 1928 Lah. 209. 16 (1866) 6 W.R. (Mis.) 44.

the surety to pay the decree amount, in execution of the original decree, thus obviating the necessity of a separate suit. (For a fuller discussion of the application to the Law of Limitation of the general doctrine that the surety's liability is ordinarily co-extensive with that of the principal, *see* 39 M.L.J. (Journal), p. 67.

The Allahabad view practically adds the words "deemed to be" before the words "passed jointly" in Art. 182, Expl. I. It is very doubtful if that course is permissible especially when the Limitation Act is later than the Civil Procedure Code.

The fourth argument only puts the third in another way. In *Cholappa* v. *Ram Chandra*[13] the question related to the starting point of limitation for an application to execute against the sureties a decree passed on appeal (see also *D. Manackjee* v. *R. M. N. Chettiar Firm*[17]). In holding that the date of the appellate decree is the starting point, the decisions proceeded on the theory that the security must be taken to have been given for the satisfaction of a permanent decree, and that the decision of the Court of last resort is the decision in the suit. In *Cholappa* v. *Ram Chandra*[13] the decision in *Narayan* v. *Timmaya*[1] was distinguished as having nothing to do with the case and cannot be taken as questioning the earlier case. (*See* also *Manackjee* v. *R. M. N. Chettiar Firm*[17] for the scope of the application of this doctrine.) The position of the surety during the pendency of the appeal when the principal debtor obtains a stay of execution of the decree is anomalous. All the while the decree may be executable against him but yet the limitation does not begin to run against him. (See *Parameswaran Nambudiri* v. *Seshan Pattar*[18] for a discussion as to how far the period which has to be deducted as regards one judgment-debtor should be excluded as regards other joint judgment-debtors also, though there was no obstacle for executing against the latter.)

One other argument deserves notice and that arises from the fact that the surety's liability is in *default of payment* by the judgment-debtor. In one case, the Lahore High Court has gone to the extent of holding that the executing Court should, before proceeding against the surety, satisfy itself that

1. (1906) I.L.R. 31 B. 50. 13. (1919) I.L.R. 44 B. 34.
17. (1926) I.L.R. 5 Rang. 492 at 496.
18. (1928) I.L.R. 51 M. 586: 55 M.L.J. 156.

the decretal amount could not be realised from the principal debtor and record a finding to that effect. (*The Firm Nandu Shah Jailal* v. *The Firm Amolak Ram-Hans Raj*[19]). The words in that case were "if it were not realised from the principal debtors" though the usual form is "in default". It is perhaps too much to rely on the difference in words. It cannot be disputed that the starting point is the date when the decree becomes operative and executable (*Rameshwar Singh* v. *Homeshwar Singh*[20]). The answer is given by Mr. Justice Devadoss in *Nawab Shuja-ul-mulk Bahadur* v. *Umir-ul-umra Bahadur.*[21] Where the decree does not specifically mention the period after which the decree becomes executable against a particular individual, the decree is deemed executable from the date on which it is passed, and when "a decree directs the principal debtor to pay the decree amount and that on the failure of the plaintiff to recover it from the principal debtor, he should be entitled to proceed against the surety, it cannot be said that the creditor has 12 years' limitation against the principal debtor and another 12 years against the surety."

As an answer to the question referred, it is difficult to reconcile the final judgment in *Nawab Shuja-ul-mulk Bahadur* v. *Umir-ul-umra Bahadur*[21] with the principle in *Rameshwar Singh* v. *Homeshwar Singh*[20]; but the decision itself if read with the decree (extracted on p. 862) is intelligible. The question contains the words "only on failure" whereas the decree merely says "on failure" and omits the emphasis suggested by the word "only". (*See* the judgment of Wallace, J. on p. 857.)

ROOP CHAND *v.* SARDAR KHAN, I.L.R. 9 Lah. 526.

A suit cannot be dismissed merely because one of the defendants was dead at the time of the institution of the suit. The name of the deceased person should be struck out and the case should proceed against the other defendants on record. It was no doubt held by the Madras High Court in *Veerappa Chetty* v. *Tindal Ponnen*[22] that such a suit must be regarded as a nullity where the *sole* defendant on record was dead at the

19. (1927) 102 I.C. 710.
20. (1920) L.R. 48 I.A. 17: 40 M.L.J. 1 (P.C.).
21 (1925) I.L.R. 48 M. 846 at 849: 49 M.L.J. 498.
22. (1907) I.L.R. 31 M. 86: 17 M.L.J. 551.

time of institution of the plaint and that the Court had no jurisdiction to amend the plaint by bringing the legal representatives on record. It is not clear from the decision whether their Lordships intended to make an exception in the case where a fresh suit would be barred against the legal representatives, in cases where the original defendant was impleaded as such, *bona fide* and in ignorance of his death. Whatever that may be, where there are several defendants on record, some of whom are alive at the institution of the suit, the suit cannot be regarded as a nullity. If owing to non-joinder of necessary parties the suit cannot go on against the other defendants alone, it will be open to the Courts to allow an amendment in proper cases. Section 153 of the Civil Procedure Code is sufficient authority for the said purpose. The later Full Bench decision of the Madras High Court in *Gopala Kristnayya* v. *Lakshmana Rao*[1] permits an amendment of the cause title in the case of an appeal memorandum even where *Kristnayya* v. *Lakshmana Rao* permits an amendment of the appeal.

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1. (1924) I.L.R. 49 M. 18: 49 M.L.J. 590 (F.B.).

JOGI REDDI *v.* CHINNABBI REDDI, I.L.R. 52 Mad. 83: 56 M.L.J. 165 (P.C.).

This is a very curious case on the facts though by no means unusual, of two different families living together—in this case with this extra peculiarity that one of them was a Christian, pooling their resources together, acquiring properties together and meeting the expenses together after the fashion of an ordinary joint family. The facts were these: There were three Hindu brothers who were members of an undivided Hindu family. They had some property not of the best kind. They had a sister who married a Christian who had more property. On the death of the husband leaving a four year old son, the sister with her son came over to her brothers and lived with them, and the son after coming of age also continued to live with them. During this time parties put their income and their earnings together, made purchases of properties—met their common expenses after the manner of ordinary joint Hindu family. The question was, what is the proper inference to make? The High Court agreeing with the Sub-Court held that the proper inference was that the parties treated both the original contribution as well as the subsequent acquisition as common property and on that basis gave one of the brothers who sued one-fourth of the entire properties. The appeal to the Privy Council was confined to two items of properties—first, the property of the father inherited by the nephew; secondly, the undivided half of an uncle of the nephew purchased in the name of the nephew. Their Lordships held that on these facts, it could not be inferred that the nephew wanted to create an interest in the family in the former set of property or that the latter was intended to be for the benefit of all the co-owners. The main considerations that influenced their Lordships were: (i) the fact that the two families could not make a joint family, (ii) that the nephew was a Christian, and (iii) that for a considerable portion of time the joint living was going on, the nephew was a minor and as such there could be no creation of any interest in favour of the uncles during that time and continuance of the previous state of affairs was not therefore inconsistent with the non-creation of any such interest. As regards the purchased property the circumstance that it was purchased of the joint income was no doubt according to their Lordships a circumstance in favour of joint ownership but it raised only a rebuttable presumption and was excluded by circumstances which showed that the purchase was rather because the income of the nephew's properties was the more consider-

able. Their Lordships held that the finding of the Sub-Court as to the agreement on appeal though a finding of fact could not bind the Second Appellate Court as it was based on a wrong view of burden of proof.

WALLER *v.* WALLER, I.L.R. 10 Lah. 64.

Jurisdiction in divorce, at any rate for passing a decree of dissolution of marriage, is, according to English Law, now founded upon the domicile of parties. The Indian Divorce Act of 1869, however, proceeded upon the basis that jurisdiction depended upon residence. Some doubt had been cast upon this view by the decision in *Keys* v. *Keys*.[1] The actual question there was merely as to the extra-territorial effect of an Indian decree of divorce on parties not domiciled in India but merely resident there. It was held that such decrees for divorce are not valid in England but the question was also raised whether the Indian Act if it conferred jurisdiction based on residence alone apart from domicile was not *ultra vires* and invalid. Notwithstanding this subsequent decisions in India reiterated the older view that residence in British India was sufficient to found jurisdiction, though in some cases a distinction was made between a decree for judicial separation and one for dissolution of marriage. Even in England down to the decision in *Le Mesurier* v. *Le Mesurier*[2] it could not be said that the law was settled as finally laid down by the House of Lords. In this state of authorities, the Indian Divorce Amendment Act of 1926 (Act XXV of 1926) was passed by the Indian Legislature which now prohibits Indian Courts from passing or confirming a decree for dissolution of marriage where the parties are not domiciled in India. The English Parliament however proceeded on different lines and passed in December, 1926, the Indian and Colonial Divorce Jurisdiction Act permitting High Courts in India, in certain defined cases, to pass a decree for dissolution of marriage even where the parties are domiciled in England and Scotland provided they are resident in India. There is also a validating section (S. 3 of the Statute) which validates all decrees for dissolution of marriage passed by the Indian Courts provided the proceedings were commenced before the passing of this statute. It was held in the decision under notice that the clear intention of the Parliament to validate all such decrees passed before the 15th December, 1926, has been nullified as regards decrees not passed before

1. L.R. (1921) P. 204. 2. (1895) A.C. 517.

25th March, 1926, the date of passing of the Indian Act (XXV of 1926) as the English Act apparently proceeded in ignorance of the existence of the Indian Act. It is curious that the attention of the authorities in England was not drawn to the existence of the Indian Act, by the Government of India or the India Office

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KAMAKHYA NARAYAN SINGH *v.* RAM RAKSHA SINGH, L.R. 55 I.A. 212: I.L.R. 7 Pat. 649: 55 M.L.J. 882 (P.C.).

It is important to note that the point of distinction between this decision and the set of decisions like *Maharaja of Jeypore* v. *Rukmini Pattamahdevi*[1] and *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[2] lies in the fact that in the latter class of cases the parties admit the continuing relationship of landlord and tenant throughout the material periods but only differ as regards the nature and incidents of the tenancy, its extent, duration, rights, etc. In the present case, their Lordships find as a fact on the entire evidence that there was no express or implied agreement between the parties after the determination of the original grant that a tenancy should continue from year to year. Their Lordships hold that no reliance could be placed on the terms of section 116 of the Transfer of Property Act either, for apart from the inapplicability of the sections 116 and 117 to the tenure in question, the evidence warranted an inference of an implied agreement to the contrary. The plaintiff never claimed or admitted the relationship of landlord and this fact differentiates the present case from the other decisions. The mere payment of rent for some time by the defendants was in the circumstances held to be not conclusive against them so as to make them tenants from year to year. It followed that the defence of adverse possession under Art. 144 of the Indian Limitation Act was open to them and the plaintiff's suit in ejectment consequently failed.

RAGHUBARDAYAL *v.* RAMDULARE, I.L.R. 6 Rang. 367.

This was a reference to a third Judge (Das, J.) on a difference between Carr and Pratt, JJ. All the Judges being agreed that, as held in *Nana Tawker* v. *Ramachandra Tawker*,[3] an undivided son excludes a divided son from inheriting to his father's self-acquisitions, the only question was if the plaintiff was divided from his father. To prove this reliance was placed

1. (1919) L.R. 46 I.A. 109: I.L.R. 42 M. 589· 36 M.L.J. 543 (P.C.).
2. (1923) L.R. 51 I.A. 83: I.L.R. 47 M. 337· 46 M.L.J. 546 (P.C.).
3. (1908) I.L.R. 32 M. 377.

on (i) The long separation between the father and the son, the son living in India and the father in a distant country Burma, (ii) The non-maintenance of filial relationship between them, and (iii) The failure of the son to join his father after his attaining majority. The majority hold that these circumstances will not suffice to deprive the plaintiff who was living away from his father of his share in the estate. That a heavy onus is thrown on the person pleading separation to prove it and that separate residence, separate acquisitions of property and cesser of commensality are all merely circumstances raising a presumption of separation cannot be denied. *Ganesh Dutt Thakoor* v. *Jewach Thakoorain*[1] and *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya*.[2] But reading *Mussumat Anundee Koonwur* v. *Khedoo Lal*[3] it looks as though the Judicial Committee might have accepted the circumstances in the case under review as sufficient to prove partition, if any foundation was laid to prove animus on the part of the father to be divided from the son. In *Kunwar Bahadur* v. *Madho Prasad*[4] it has been held that the fact that some of the sons lived away from the father while others lived with him would not deprive the sons who lived away from him of their share in his estate.

Though several cases have assumed the rule of preference of undivided to divided sons, it has been questioned by a Full Bench of the Madras High Court in *Vairavan Chettiar* v. *Srinivasachariar*[5] and may require reconsideration. The basis of the judgment in *Nana Tawker* v. *Ramachandra Tawker*[6] is that the dictum of the Mitakshara contained in Ch. I, S. 1, clause 27 and S. 5, clause 10 that the son has a right by birth in the property of the father whether ancestral or self-acquired has not been dissented from in *Balwant Singh* v. *Rani Kishori*[7] and that therefore succession to self-acquired property was by survivorship rather than by inheritance and he who took it by survivorship would exclude the divided sons. That basis is now held to be erroneous by the Full Bench in *Vairavan Chettiar* v. *Srinivasachariar*[5] and in the words of Sastriar, J., it will now be doubtful if "the imperfect right of the son in his father's self-acquisitions may have sufficient efficacy to entitle him to succeed to it to the exclusion of a divided son."

1. (1903) I.L.R. 31 C 262. 2 (1906) I.L.R. 30 M. 201.
3. (1872) 14 Moo I A. 412
4 (1918) 17 A.L.J. 151: 49 I.C. 620.
5. (1921) I.L.R. 44 M 499: 40 M.L.J. 481 (F.B.)
6. (1908) I.L.R. 32 M 377.
7. (1898) L.R. 25 I.A. 54: I.L.R. 20 A. 267 (P.C.).

BAMA CHARAN DAS *v.* GADADHAR DAS, I.L.R. 56 Cal 21.

The question whether an appellate court can interfere with an order of the lower court setting aside an award, on an appeal against the decree of the lower court on the merits, is one which is settled in the affirmative by a long course of decisions since 1870 and the learned judges have in coming to this conclusion in the decision under notice rested themselves more on the rule of *stare decisis* than on a construction of the terms of section 105 .(1) of the Civil Procedure Code and the rulings construing the same. There has been a great deal of conflict in the decisions of the various High Courts regarding the effect of the sub-section. The tendency in recent years has been to construe the expression "affecting the decision of the case" as meaning affecting the decision of the case on the merits, thus reading words into the section which are not there. It is also significant to notice that the language of the corresponding section of the Code of 1859 was "affecting the merits of the case" from which the legislature has departed in the later Codes, apparently with a view to widen the scope of interference of the appellate court with the decisions of the lower courts. Acting on the view that notwithstanding the change, the expression only means "affecting the merits of the case," all the High Courts excepting the Madras High Court have held that an order setting aside an *ex parte* decree cannot be questioned in an appeal against the decree on the merits; while the Madras High Court has recently drawn a distinction between various classes of orders setting aside *ex parte* decrees themselves to the effect that while some classes of orders setting aside *ex parte* decrees can be questioned in appeals against decrees passed on the merits, they cannot be questioned in other cases. See *Athamsa Rowther* v. *Ganesan* [1] and *Venkatanarasu* v. *Kotayya.*[2] It may well be doubted whether there is any warrant for this further distinction in the language of section 105 (1). If however a restricted meaning has to be given to the wording of section 105 (1) limiting it to cases where the decision of a case has been affected with reference to its merits, it is difficult to see how a distinction can be made between orders setting aside *ex parte* decrees, orders setting aside abatement on the one hand and orders setting aside an award as in the present case and in *Harbhajan* v. *Mewa Singh.*[3]

1. (1924) 47 M.L.J. 641. 2 (1926) 51 M.L.J 119
3. A.I.R. 1928 L. 753: 110 I.C. 748.

RAMESWAR KHERORIWALLA *v.* EMPEROR, I.L.R. 56 Cal 32.

In this case an application under section 491 of the Criminal Procedure Code was made to a Division Bench of the Calcutta High Court to release an accused who was charged only with bailable offences who had been enlarged on bail but was subsequently remanded by the order of a Judge presiding over the Criminal Sessions to custody for having tampered with the witnesses for the prosecution and the learned Judges without going into the legality of the remittal to custody rejected the application on the ground that his custody was ordered by a Judge and could not be gone into again by another bench of the same Court. Apparently the learned Judges were not clear about the correctness of the order of the Judge remitting the accused into custody in the face of the provisions of section 496 of the Code; otherwise, it is difficult to see why the application should not have been disposed of on the merits. It is also open to question whether the provision in section 561-A. of the Code saving the inherent powers of the High Court can be invoked as against the specific provision in section 496. Coming to the ground of decision itself, that the question had been dealt with by one Judge of the High Court and that another bench should not entertain a similar application, one may venture to doubt whether, if instead of being an application under section 491 of the Criminal Procedure Code, it had been one for a writ of *habeas corpus* to the High Court under its Common Law powers, it would have been an answer to say that the matter of detention was considered legal by another Judge of the same Court. Reference may be made in this connection to the recent decision of the Privy Council in *Eshugbhayi Eleko* v. *Government of Nigeria (Officer Administering)*[1] where the Lord Chancellor reviewed the nature of the writ of *habeas corpus* from the earliest times and laid down that notwithstanding its refusal by one of the Judges after going through the merits fully, the party has the right to go before every other Judge of the same Court and the latter is bound to go into the legality of the detention notwithstanding the previous order of the other Judge. It may be mentioned in this connection that the enactment of section 491 in the Criminal Procedure Code does not in any way affect the Common Law powers of the High Court in the matter of *habeas corpus.* Cf. *Mahomedalli* v. *Ismaiji Abdulali.*[2] It may be a question whether the question must be answered differently if the appli-

1. (1928) A.C. 459. 2. (1926) I L.R. 50 B 616.

cation is made under section 491 and not under the Common Law powers of the High Court. In any event it may be doubted whether even after this decision under notice, it may not be open to the party to bring up once more the legality of the detention for review before the High Court under its Common Law jurisdiction on a writ of *habeas corpus* relying on the exposition of the law in *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*[1] notwithstanding the decision of Buckland, J., and of the Division Bench.

HARI MOHAN DALAL *v.* PARMESHWAR SAHU, I.L.R. 56 Cal. 61.

The question that came up for decision in this case was whether time for an application for restitution under section 144 of the Code of Civil Procedure could be reckoned under Article 181 of the Limitation Act from the decree of the highest Court of appeal which affirmed the decree of the lower appellate Court which however reversed that of the first Court; and the majority of the Judges who took part in the decision held that as the applicant had the right to apply for restitution when the decree of the first Court was reversed by the lower appellate Court, time runs against him from the decision of the lower appellate Court under Art. 181 and that he cannot have three years under that article from the decree of the High Court affirming that of the lower appellate court. If the matter were to come up before the Madras or the Bombay High Courts the application would have been held to be in time under Article 182 (2) of the Limitation Act, as these Courts have held the view that an application for restitution under section 144 of the Civil Procedure Code is really of the nature of an execution application and as such is governed by Article 181. *Somasundaram* v. *Chokkalingam*,[2] *Unnamalai Ammal* v. *Mathan*,[3] *Panchapakesa Aiyar* v. *Natesa Pathar*,[4] *Kurgodigouda* v. *Ningangouda*[5] and *Hamidalli* v. *Ahmedalli*.[6] But the High Courts of Calcutta, Allahabad and Patna have held that an application for restitution is not in the nature of an application for execution and is therefore governed by Art. 181. See *Balmakund Marwari* v. *Basanta Kumari Dasi*,[7] where all the cases are collected and reviewed.

Even in this view, it is by no means clear that it necessarily follows that Art. 181 must be applied from the date of

1. (1928) A.C. 459.
2. (1916) I.L R. 40 M 780
3. (1917) 33 M.L.J. 413
4 (1926) 51 M L J. 161
5. (1917) I.L.R. 41 B 625
6. (1920) I.L.R. 45 B 1137.
7 (1924) I.L.R. 3 Patna 371.

the decree of the lower appellate Court and that there is no scope for the rule that when an appellate Court passes its decree, it supersedes that of the lower appellate Court even though it is one of affirmance and that as a consequence time under Art. 181 might run from the decree of the final appellate Court. The learned Chief Justice would seem to think that this effect of the decision of the appellate Court is a metaphor and is apt to mislead one from strict legal notions. Reliance has also been placed by His Lordship on some of the observations of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Choudhury*[1] regarding the legal effect of the appellate Court's decision when confirming that of the lower court. We would venture to point that this metaphor as to the supersession of the decision of the lower court by that of the appellate court has the sanction of the Privy Council in the recent decision in *Jowad Hussain* v. *Gendan Singh*[2] and was given effect to with reference to Art. 181 of the Limitation Act itself. This decision is further of importance as the observations in *Juscurn Boid* v. *Pirthichand Lal Choudhury*[1] relied on by the learned Chief Justice were relied on by the appellant in that case but were not given effect to by their Lordships. In the case before their Lordships of the Privy Council, there was a preliminary decree in a mortgage suit which was affirmed on appeal and an application for final decree was made within three years of the decision of the appellate Court but more than three years from the date fixed by the first Court's decree. Their Lordships held that Art. 181 applied to the case and time ran from the decision of the appellate Court which affirmed the preliminary decree of the first Court. This view was further affirmed by the Privy Council in *Fitzholmes* v. *Bank of Upper India, Ltd.*[3] The same view had been taken by the Madras High Court in *Venkayya* v. *Sathiraju*,[4] where the observations of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Choudhury*[1] were noticed by the learned Judges. If this is the correct statement of the law, there can be no distinction in principle in the case of an application for restitution and we venture to submit that an application for restitution though governed by Art. 181 might not be out of time if it were made within three years of the final appellate decree but more than three years after the decree of the lower court which it affirmed.

1. (1918) L.R. 46 I.A. 52: I.L.R. 46 C 670: 36 M.L.J. 557 (P.C.)
2. (1926) L.R. 53 I.A. 197: 51 M.L.J. 781 (P.C.)
3. (1926) L.R. 54 I.A. 52: 52 M.L.J. 366 (P.C.)
4. (1921) I.L.R. 44 M. 714: 41 M.L.J. 117.

PINDEE *v.* U HPA, I.L.R. 6 Rang. 315.

From the report, it is difficult to gather the facts exactly but from the reference in the judgment to *Moreshwar Balkrishna* v. *Dattu*[1] it would appear that an unregistered or oral sale followed by possession was set up by the alleged prior vendee to defeat the title of a subsequent registered purchaser. At the same time, a lease back to the vendor appears also to have been set up, the vendor continuing to be in possession under that lease on the date of the subsequent sale.. It must be pursuing the theory of the validation of title by part-performance with a vengeance to hold that when possession continues with the owner—though as a lessee—the subsequent purchaser must be taken to know the character of the possession in which the vendor holds it. The cases have loosely stated that the position of such a purchaser is as though a document in accordance with law were executed and registered but it will be reading much more into those judgments than was intended. The contention that as soon as the vendor is put in possession under the agreement to resell, he acquires an equitable title to the property and nothing that he might do afterwards could divest him of it, was recently negatived by a Bench of the Madras High Court in a considered judgment (*see* 55 M.L.J. (N.R.C.) 45).

MA MI *v.* MAUNG AUNG DUN, I.L.R. 6 Rang. 376.

In order to raise a loan of Rs. 1,000 *A* purported to sell his lands to *B* by an *ex facie* absolute conveyance and some time later when he needed more money, he got *B* to convey the lands to *C* with an oral agreement on the part of *C* that he should convey the lands back to *A* on certain terms. There was a similar agreement between *A* and *B* at the time of the purported sale by *A* to *B*. The learned Judges have held that *A* is not an actual party to the outright conveyance by *B* to *C* and as such can prove the oral agreement to resell the lands to him. The argument that in reality the parties to the conveyance are *A* and *C* and that *B* merely represented *A* in the transaction is noticed in the judgment, but says Justice Heald: "In a somewhat similar case, namely the case of *Maung Kyin* v. *Ma Shwe La*[2] their Lordships of the Privy Council have held that S. 92 of the Evidence Act did not apply." In narrating the facts of that case the Judge fails to note that there Myang (*A*) was not

1. (1888) I.L.R. 12 B 569.
2. (1917) L.R. 44 I.A. 236: I.L.R. 45 C 320: 33 M L.J. 648 (P C).

a *party* to the later transaction between *B* and *C*, though the evidence showed that by that arrangement, *A* desired and obtained a reduction in the rate of interest. In *Talak Chand* v. *Atmaram*[1] where the part of *A* was to engross and attest the sale-deed, it was held that Maung Kyin's case did not apply to the facts therein and that *A* was barred from proving the oral agreement. In the case under notice, *A* though not *eo nomine* a party to the conveyance was the real party. The transaction originated from him and *B's* part was no more than to execute the conveyance *benami* for *A*. The effect of this view will be that the *real party* to the document can circumvent the provisions of S. 92 by putting it *benami* in another's name. An exception to S. 92 is made in S. 99 in favour of third persons (not parties to the instrument) in order that they might not be prejudiced by things recited in the document, contrary to the truth, through the ignorance, carelessness or fraud of the parties, and that principle cannot operate in a case where the third party has been the principal figure in the transaction. (*See* 35 M.L.J. (N.I.C.) 25 and 36 M.L.J. (N.I.C.) 11 for a criticism of Maung Kyin's case and *Gamu walad Ramji* v. *Bhau walad Bapuji.*[2])

The learned Judges distinguish *Maung Shwe Phoo* v. *Maung Tun Shin*[3] on the ground that "in that case the parties to the conveyance and to the alleged oral agreement were the same." *A* ostensibly sold certain properties to *B* with an agreement to resell and *B* in turn conveyed them to *C* by an outright conveyance. *A* brought the suit for a decree directing *C* to reconvey the property to him and made *B* also a party to that suit. The Judges held that the evidence adduced by *A* to show that the conveyance to *B* was only a conditional sale was obnoxious to the provisions of S. 92 of the Evidence Act. If *B* were not a party to the suit, the case would have been *ad idem* with Maung Kyin's case, which does not appear to have been cited before them.

JAGDEO NARAIN SINGH *v.* RANI BHUBANESHWARI KUER, I.L.R. 7 Pat. 708.

In this case, the filing of a list of witnesses in attendance, by a decree-holder, in connection with a petition by a judgment-debtor under Order 21, Rule 90 to set aside a sale was held

1. (1923) 25 Bom. L.R. 818
2. (1918) I.L.R. 42 B. 512.
3. (1927) I.L.R. 5 Rang. 644.

by their Lordships to amount to "an application to the Court to take a step-in-aid of execution" within the meaning of Art. 182, clause (5) of the Indian Limitation Act. The contention that there should be a pending execution application in which only there could be an application to take a step-in-aid is rejected. This view, though it is supported by the decision in *Kuppuswami Chettiar* v. *Rajagopala Aiyar*,[1] has subsequently been dissented from even in Madras in later cases. See *Krishna Pattar* v. *Seetharama Pattar*,[2] *Abdul Karim Sahib* v. *Lakshmanaswami*[3] and *Mathonkandi Kannan* v. *Thayyil Pakkutti Avulla Haji*.[4] Still it may be a question whether the decision under notice has not gone to the extreme length inasmuch as there does not appear to have been an application that the Court should take some step-in-aid of execution. It would not be enough that a party takes some step towards execution. See *Rangachariar* v. *Subramaniam Chetti*,[5] *Raghunandhan Misser* v. *Kallydut Misser*.[6] The Madras High Court holds that an objection filed by a judgment-creditor objecting to the recording of satisfaction at the instance of a judgment-debtor cannot be regarded as a step-in-aid. The view adopted by the present judgment is that even a step taken by the decree-holder towards removing an obstacle in the way of further execution is a step-in-aid of execution. The Madras High Court is inclined to take a narrower view as it holds that an application to take a step-in-aid must be one which is *by itself* in furtherance of execution proceedings. In the present case the judgment-creditor must be taken to have made an oral application to the Court that the Court should take down the evidence of the witnesses mentioned in the list filed by him on the day of hearing. It is only in that view that the requirements of Art. 185, cl. (5) can be deemed to be satisfied.

HAZARIRAM *v.* KEDAR NATH MARWARI, I.L.R. 7 Pat. 726.

An attachment of a decree for money does not prohibit a transfer thereof but it does not follow therefrom, as the learned Judges assume, that the transferee decree-holder can apply for execution of the attached decree under O. 21, R. 16. O. 21, R. 53,

1. (1921) I.L.R. 45 M 466: 42 M.L.J. 303.
2. (1926) I.L.R. 50 M 49: 51 M.L.J. 480.
3. (1927) 27 L.W. 475.
4. (1926) 52 M.L.J. 1.
5. (1920) 12 L.W. 9.
6. (1896) I.L.R. 23 C. 690.

cl. (*b*) (ii) indicates that the attached decree can be executed only either by the holder of the decree in execution of which the attachment has been effected or by his *judgment-debtor*. The later term would ordinarily denote the decree-holder of the attached decree and will not include the transferee decree-holders who are not the judgment-debtors of the attaching decree-holder. The right of the transferee decree-holder to execute the transferred decree which ordinarily depends merely upon the general language of O. 21, R. 16 may well be taken to be not available in the case of a transferee of an attached decree for which a special provision is made in O. 21, R. 53 which should on general principles prevail over the terms of O. 21, R. 16. Similarly also the provisions of S. 146 will not avail the transferee decree-holder. as O. 21, R. 53 must be taken to provide otherwise and S. 146 is applicable only where the Code does not provide otherwise. In such cases the attachment must first be released before the transferee decree-holder can himself take proceedings to execute the decree.

The further observation in the judgment under notice that in the case of attachments of decrees the general provisions of S. 64 of the Code do not apply as the effect of the attachment is specially dealt with by O. 21, R. 53, cl. (*b*) which to that extent will be exclusive, is supported by the decision of the Full Bench of the Madras High Court in *Bhavirisetti Lakshminarasimham* v. *Vetcha Lakshminarasimham*.[1] The reference to O. 21, R. 16 in the second para. of the headnote is however an obvious mistake for O. 21, R. 53, cl. (6), Civil Procedure Code.

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1. (1927) I.L.R. 50 M. 677: 53 M.L.J. 150 (F.B.).

AMMALU AMMA *v.* NARAYANAN NAIR, I.L.R. 51 Mad. 549.

Somewhat analogous to the case under review is *Vellayappa Moothan* v. *Krishna Moothan*[1] where it was held that members of ordinary Hindu family whether manager or otherwise cannot claim exemption from limitation on the ground that they have to sue themselves in part. The position of the karnavan is not that of trustee and even in the case of a trustee, it is doubtful if the correct view with respect to the Indian Limitation Act is not to hold that having regard to his position, a duty to account arises and in respect of which there is no limitation. Similarly in the case of executors. He has a duty to call in the assets and his failure to collect would give rise to a fresh cause of action. If he is the creditor he would be entitled to pay himself before the limitation period expires. One specific case that of administration being granted to the debtor is provided for by S. 9 of the Limitation Act. Where no similar provision is made in the case of executors it seems to be unjustifiable to give similar relief in such a case. So also, in cases where specific starting points for limitation are prescribed it seems to be difficult when suing in those forms of action to plead any exemption by reason of the right vesting in the person liable as trustee or executor or managing member. It is quite another question if the action is one for account which may arise on the termination of the relationship or to which no limitation might be applicable. The case might be different also where adverse possession is to be made out under the Statute. It is difficult to conceive of adverse possession when the person who is to vindicate the right is the same person as the one that is liable. In such a case there is full scope for the application of the doctrine that there is no adverse possession when both the person in default and the person entitled are the same. These questions may arise under Arts. 144, 124 or possibly under Art. 120. In *Palaniyandi Malavarayan* v. *Vadamalai Oodayan*[2] Mr. Justice Sundara Aiyar had to do with a case like that. It is a little more difficult question whether adverse possession which has once commenced will be terminated by such combination of capacities. There is no reason why it should not. It is not analogous to the case of a person who is in adverse possession becoming a co-owner in which case *Velayudham* v. *Subbaroya*[3]

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1. (1917) 34 M.L.J. 32.
2. (1912) 18 I.C. 373.
3. (1915) I.L.R. 39 M. 879.

held that his adverse possession ceased but the Privy Council held to the contrary, *Varada Pillai* v. *Jeevarathnammal*.[4] A co-owner's case is not a case of a duty being owed. His is a case of presumption; his possession is presumed to be not adverse till the contrary is shown. In the case of persons in fiduciary position it is otherwise. Unless they are able to show that they set up adverse possession to the knowledge of the beneficiaries they cannot set up adverse possession. In some cases such as that of trustee and executor, it may be that they cannot at all set up adverse possession when once they accept the trust without giving up possession. Cf. *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*.[5] In these latter cases, the correct position is to hold that adverse possession that has commenced will cease on the party claiming adverse possession accepting the position of a trustee or executor. It is at his option to accept that position or not. If he does, he loses the benefit of the adverse possession in his favour.

LANKA SANYASI *v.* LANKA LAKSHMAN NAIDU, I.L.R. 51 Mad. 763: 55 M.L.J. 374.

While agreeing with the view that a decree passed against a person sued as a minor after his coming of age without the fact of his majority being disclosed might not affect the decree, their Lordships hold at the same time that a compromise entered into by the guardian though with the sanction of the court will not bind the major defendant. The reason for the distinction is that though there is no duty cast upon the plaintiff to notify the fact of majority to the Court, that cannot prolong the authority of the guardian *ad litem* to bind the minor even after he has come of age. On a similar ground, their Lordships have held in *Tanguturi Jagannadham* v. *Seshagiri Rao*[6] and *Krishnaswami Aiyangar* v. *Soorikutti Ganapathi Aiyar*[7] that though failing to get a minor declared a major during execution is nothing more than an irregularity if, for instance, it becomes necessary to issue notice as for instance under Order 21, Rule 22 and notice is issued only to the guardian that is a very material irregularity and would afford ground for setting aside the sale if it takes place without notice to the minor who has attained majority. Of course, there may be other reasons for holding

4. (1919) L.R. 46 I.A. 285: I.L.R. 43 M. 244: 38 M.L.J. 313 (P.C.).
5. (1911) I.L.R. 34 M. 257: 21 M L.J. 669 (P.C.).
6. (1916) 20 M.L.T. 479. 7. (1921) 14 L.W. 638.

the major bound by the conduct of his guardian which are in the nature of estoppel or acquiescence but apart from those circumstances, the proceeding by the guardian would not bind him. One such instance would be whether the person that enters into the compromise is the elder brother or father and manager of the family. In that case the compromise might bind him apart from his consent. Again, he might be aware of the steps taken by the guardian and yet not object to it. From this it might be inferred that he was a consenting party.

Another point that arose was whether if the compromise was bad against one of the defendants, it would be bad also against the other. *Jamna Bai* v. *Vasanta Rao*[1] seems to be clear on the point and justifies the answer in the negative given by their Lordships.

CHINNAPPA REDDY *v.* THOMASU REDDY, I.L.R. 51 Mad. 839.

The subject of consideration in this case is that ill-considered section 43 of the Provincial Insolvency Act supposed to be drafted for the benefit of the creditors but capable of doing the largest amount of mischief. The view taken in this case is that the section is mandatory and that the Court has no power to extend the time to apply for discharge by the insolvent. Their Lordships here make a distinction between the case of a debtor applying for discharge and a creditor or receiver so doing and are apparently prepared to concede a greater discretion in extension of time when the application is made on behalf of creditors but in either case they think, the application shall be made before the expiration of the period fixed for applying for discharge. Whether this view is sound or not, there is no doubt of the great hardship such a view might occasion to creditors. It would be possible to dishonest debtors by this means to effectively prevent applications under sections 53 and 54. If the view taken in *Jethaji Peraji Firm* v. *Krishnayya*[2] is correct, it may not prevent the consideration of applications already pending, but if no applications have been already made, the three months or two years' period prescribed by the Act for impeaching the alienation might have gone by and no application for the benefit of creditors on a fresh application to declare him an insolvent might be available. So far as limitation is concerned section 78 of the

1. (1916) L.R. 43 I.A. 99: I.L.R. 39 M. 409: 31 M.L.J. 28 (P.C.).
2. (1928) 29 L.W. 649.

Act might save creditors who have already proved their debts but in the case of others who may not have proved in the false security of a pending insolvency they might altogether lose their remedy. Thus the section would seem to be in many cases a powerful ally of dishonest debtors than a beneficent provision for the creditors. Section 43 can be used by overworked Courts to get rid of a lot of pending work—at any rate the temptation to do so is great and section 37 though available if wisely used to relieve the situation to certain extent, is not as largely used as is to be desired.

We agree with their Lordships Venkatasubba Rao and Reilly, JJ., who held in *Jethaji Peraji Firm* v. *Krishnayya*[1] that notwithstanding the use of the word "shall" in the section, the Court's discretion to extend the time even after the expiry of the time prescribed is not taken away. Their Lordships rely for the purpose upon *In re Lord Thurlow, Ex parte Official Receiver,*[2] a case under the English Bankruptcy Act and *Badri Narain* v. *Sheo Koer,*[3] a case under the Civil Procedure Code of 1882. In the latter case, the Privy Council held, on a construction of S. 549, Civil Procedure Code, which provided that "if security was not furnished within such time as the Court orders, the Court shall reject the appeal'' that the Court had a discretion to extend time even after the time fixed has expired. See also *Rajab Ali* v. *Amir Hossein*[4] to the same effect. In *In re Lord Thurlow, Ex parte Official Receiver,*[2] notwithstanding a later provision in the Bankruptcy Act that in certain circumstances the Court *shall* adjudge the person an insolvent, the Court of Appeal held that the Bankruptcy Court had a discretion to extend time relying on an earlier section which gave it power to adjourn for good cause.

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1. (1928) 29 L.W. 649.
2. (1895) 1 Q.B. 724.
3. (1889) L.R. 17 I.A. 1: I.L.R. 17 C. 512 (P.C.).

V.E.R.M. FIRM *v.* MAUNG PO KYONE, I.L.R. 6 Rang. 408.

We are unable to agree with the reasoning on which the learned Judge rests his conclusion that the party succeeding in a suit under Order 21, Rule 63 should by the decree therein be awarded his costs in the claim proceedings as well. In *Seshagiri Aiyar* v. *Marakathammal*[1] Justice Shephard refused to allow execution to be taken out for costs of the claim court on the ground that the decree in the suit had declared that the claim order shall have no effect. The learned Judge distinguishes *In re Raghunath Das* v. *Badri Prasad*[2] where the successful claimant had executed the order for costs and the Court later refused to order a refund of the same. In *Annamalai Desikar* v. *Govinda Rao*[3] it has been held by Devadoss, J., that the court has no power to award costs of the claim proceedings as the decree in the suit does not *in terms* vacate the order on the claim petition. This particular way of putting the matter is perhaps too technical, for it cannot be gainsaid that in substance the effect of the decree is to supersede the order on the claim petition (see *Kissori Mohun Roy* v. *Harsukh Das*[4]) and it has been held in *Subbarayadu* v. *Yerram Setti Seshasanti*[5] and *Sitalakshmi Ammal* v. *Krishnaswami*[6] that the words of section 144, Civil Procedure Code, are not confined to cases where restitution is claimed on the reversal of a decree in first or second appeal and if as the result in the ulterior proceeding it has been superseded, the money recovered under it ought certainly to be refunded. The Calcutta High Court has held likewise on the ground that the suit is not in any sense an appeal against the order on the claim petition but only for a declaration of the plaintiff's right. The decision under review proceeds on three grounds: (i) that the claim suit is in lieu of an appeal, (ii) that the result of the suit when it succeeds is to set aside the order in the miscellaneous proceedings, and (iii) that the practice in Upper Burma ever since 1905 has been in favour of the award of these costs. The last ground may be salutory, but the other two grounds call for some criticism. The learned Judge overlooks the obvious possibility that the decision in the claim suit is

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1. (1895) 5 M.L.J. 252.
2. (1883) I.L.R. 6 A. 21.
3. (1923) 20 L.W. 557.
4. (1889) L.R. 17 I.A. 17: I.L.R. 17 C. 436 (P.C.).
5. (1916) I.L.R. 40 M. 299: 30 M.L.J. 366.
6. (1922) M.W.N. 186.

often arrived at on different materials from those placed before the court in the summary proceedings. It is not infrequently that the very same Judge arrives at different conclusions. The appellate court has always refused the costs of the appeal, though not of the lower court as well, when the appeal is decided on (i) additional or new evidence, or (ii) on wholly different grounds. It may well be that the decision in the claim proceeding is correct on the materials then before the court. It is one of the first and highest duties of all courts to take care that the act of the Court does no injury to any of the suitors; but when the statute limits the court's enquiry and consequently an erroneous conclusion is arrived at by the court, it cannot by any means be called an injury arising from an act of the court. In the claim stage the enquiry is limited to determining the question whether the objector has some interest in, or is possessed of, the property attached, while in the suit under Order 21, Rule 63 the enquiry gets extended to the determination of the right which the objector claims to the property in dispute (see *Ramaswami Chettiar* v. *Mallappa Reddiar*,[7] *Arunachalam Chetti* v. *Periasami Servai*[8]).

Notwithstanding the numerous decisions under the section, the exact nature of a suit under Order 21, Rule 63 can by no means be said to be clearly defined yet. The judgment of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra*[9] may be said to be the pivot on which the later decisions have turned. Following the observations in that case a line of cases has held that the claim suit is a continuation of the claim proceedings and practically an appeal from the claim order (*Krishnappa Chetti* v. *Abdul Khader Sahib*,[10] *Rajamier* v. *Subramaniam Chettiar*,[11] *Venugopal Mudali* v. *Venkatasubbiah Chetti*,[12] *Khairulla* v. *Dhanrupmal*,[13] *Pratap Chandra Gope* v. *Sarat Chandra Gangopadhyaya*[14] and *Rajamier* v. *Subramania Chettiar*[15]) while other decisions have held that *Phul Kumari* v. *Ghanshyam Misra*[9] must be treated as an authority only for the actual decision in the case, namely, that the suit falls under sub-section (1) of Art. 17, Sch. II of

7. (1920) I.L.R. 43 M. 760: 39 M.L.J. 350 (F.B.).
8. (1921) I.L.R. 44 M. 902: 37 M.L.J. 546
9. (1907) L.R. 35 I.A. 22: I.L.R. 35 C. 202: 17 M.L.J. 618 (P.C).
10. (1913) I.L.R. 38 M. 535: 26 M.L.J. 449
11. A.I.R. 1928 M. 1201.
12. (1915) I.L.R. 39 M. 1196.
13. (1924) 22 N.L.R. 67
14. (1920) 25 C.W.N. 544.
15. (1928) M.W.N. 336.

the Court Fees Act (VII of 1870) as a suit "to alter or set aside a summary decision or order" (*Pethu Aiyar* v. *Sankaranarayana Pillai*[16] and *Subramaniam* v. *Narasimham*[17]). There is also the argument that oftentimes the suit is tried by a tribunal inferior to the executing court which pronounced the order in the claim proceedings and it will be too much to say that the inferior court hears an appeal from the superior court. In *Venugopal Mudali* v. *Venkatasubbiah Chetti*[12] the question arose as to the time from which limitation begins to run where a claim allowed by the High Court on the original side is dismissed by a Bench on appeal under the Letters Patent and a suit is then filed within a year from the date of the order of the Division Bench, but more than a year from the original order. Their Lordships point out that the suit is not to set aside the order passed on the claim petition by the single Judge, but it is to set aside the order of the Division Bench and hence limitation begins to run from the later order. Can it be said that the Judge in the original side when hearing the suit is either reviewing the appellate order or hearing an appeal against it.

It is observed in the case under notice that "any other view of the question would mean that there was no remedy for a wrongful order as to costs......" Such arguments have very often been summarily rejected. It is a well-recognised principle that no action will lie against a person for procuring an erroneous decision from a court of justice (*Rani Mina Kumari Debi* v. *Surendra Narain Chakraverty*,[18] *Mohini Mohan Misser* v. *Surendra Narayan Singh*[19] and *Bachoo* v. *Velji Bhimsey & Co.*[20]) and costs where adjudicable upon, are not an element in calculating damages (*Chengalvaraya Mudali* v. *Thangatchi Ammal*[21]). In most of the cases referred to and followed in *Kumarappa Chetti* v. *Nga Pyi*[22] which has been the leading case in Rangoon on this question, the first court had no jurisdiction to adjudicate upon costs and hence the Civil Court finally trying the matter awarded costs of those proceedings as damages. But where as here, the court can adjudicate upon costs and does adjudicate upon it, it is very doubtful if

12. (1915) I.L.R. 39 M 1196
16 (1916) I.L.R. 40 M. 955: 32 M.L.J. 374.
17. (1928) 56 M.L.J. 489.
18. (1909) 14 C.W.N. 96.
19 (1914) I.L.R. 42 C 550
20 (1923) 25 Bom L.R. 595.
21. (1871) 6 M. H.C.R. 192.
22. (1904-6) 2 U.B.R. (Civil) 18.

that can be set aside except on an appeal or revision against that order.

HEM RAJ *v.* KRISHEN LAL, I.L.R. 10 Lah. 106 (F.B.).

There is now a sharp difference of view between the Bombay, Lahore and Rangoon High Courts on the one hand, and Madras, Calcutta and Allahabad High Courts on the other, on the point as to whether transfers which are within two years prior to presentation of a petition in insolvency but beyond two years from the date of the actual order of adjudication can be annulled under S. 53 of the Provincial Insolvency Act (V of 1920). This Full Bench and the Bombay decision in *Nagindas* v. *Gordhandas*[1] adopt the literal construction of the language of S. 53 and hold that such transfers cannot be annulled. Whereas the Madras and other Courts hold that S. 28, cl. (7) must be read with S. 53 and so read, the doctrine of 'relation back' is applicable to make such transfers come within the scope of S. 53. The argument for the respective contentions are set forth fully in this judgment and the leading judgment for the other view, *Sankaranarayana Aiyar* v. *Alagiri Aiyar*,[2] which was under the old Act (III of 1907) where the language was the same, and *Rangiah* v. *Appaji Rao*[3] which is a decision under the new Act. There is no doubt that the view which is laid down by the Madras decisions carries out the policy of the Legislature better but it must be admitted that the language used by the legislature is very unhappy more so as there has been a change of language in the next section. This is a matter for urgent legislative interference.

1. (1925) I.L.R. 49 B. 730 (F.B.).
2. (1918) 35 M.L.J. 296.
3. (1926) I.L.R. 50 M. 300: 51 M.L.J. 719.

SHIBBA MAL *v.* RUP NARAIN, I.L.R. 10 Lah. 132.

An order granting a stay of further proceedings in a mortgage suit, pending an appeal from the preliminary decree, has been held to be a judgment within the meaning of clause (10) of the Letters Patent of the Lahore High Court. An order of refusal to stay was also held by the Lahore Court to be a "judgment," *Firm Badri Das Janaki Das* v. *Mathanmal.*[1] The Madras High Court has however in its most recent judgment in *Nageswara Aiyar* v. *Ramanathan Chettiar*[2] taken an opposite view. It holds that no appeal lies under clause (15) of its Letters Patent against an order granting stay of further proceedings on terms, in an appeal against the preliminary decree in a mortgage suit. Although the judgment points out that the order sought to be appealed against was only a conditional order granting stay it would seem that the inclination of their Lordships is to hold that no appeal lies even if there were an absolute stay. The distinction suggested between orders refusing to stay execution and orders refusing to stay further proceedings does not seem to be very convincing. The judgment under review notices the dictum of the Privy Council as to the meaning of the word "judgment" in the Letters Patent, in the decision in *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*[3] and holds that this does not overrule the view taken by the High Courts in India as regards the meaning of the term in other clauses of the Letters Patent. The Privy Council dictum was fully considered by the earlier decision of the Madras High Court in *Govindaramanuja Pedda Jeeyangarlavaru* v. *Krishnamacharlu,*[4] which was a Letters Patent appeal against an order suspending an injunction decree of the Lower Court, pending an appeal therefrom and it was held that the dictum could not be taken to be a pronouncement impliedly overruling the long series of decisions of the various High Courts in the contrary sense. It may be pointed out in passing that the explanation of the difficulty felt by the learned Judges "as to why the Privy Council in that case, after holding that no appeal was competent not only heard it but accepted it" is to be found in the fact that the Privy Council merely hold that there is no right of appeal to His Majesty in Council on the merits of the orders but an appeal will lie on the ground that there was no right of appeal to the Lower Appellate Court. This is what they mean when they say "There is no right of appeal except on the sole ground that the judgments and decrees were incompetent." See *National Telephone Co.* v. *Postmaster-General.*[5]

1 A.I.R. 1922 Lah 185 2. (1928) 56 M.L.J. 197.
3. (1925) 49 M.L.J. 25 (P.C). 4. (1926) 52 M.L.J. 161.
5 (1913) A.C. 546

MAHANTH MAHABIR DAS *v.* JAMUNA PRASAD SAHU, I.L.R. 8 Pat. 48.

A sanction of the Court granted under S. 29 of the Guardian and Wards Act (VIII of 1890) to an alienation of the minor's property by the guardian gives complete protection to the alienee and it is not competent to the minor to re-open the question of the necessity for the alienation and to call on the alienee to justify the same. The sanction of the Court does not merely shift the onus of proof on to the minor as held by the Madras High Court in *Nallakka Venkatasami* v. *Rajan Viranna*,[6] but it has the efficacy of being a sufficient justification of the alienation itself—see the later case of the Madras High Court in *R. M. Raman Chettiar* v. *Tirughanasambandam Pillai.*[7] If the alienee is a party to any fraud on the Court in obtaining the sanction, then of course, a consent obtained under such circumstances can be ignored. In other cases, it is a sufficient protection to the alienee whether it is a case of sale or mortgage that a competent court has gone into the matter and decided that the alienation is proper. The observations of the Privy Council in *Ganga Pershad Sahu* v. *Maharani Bibi*[8] also support the same position. The decision under notice further holds that the failure to comply with the requirements of S. 31 and to recite in the order itself the necessity and advantage to the minor's estate which justifies the sale is a mere irregularity, at any rate in cases where there is a substantial compliance as, for instance, where the necessity is set out in the affidavits and petition praying for the sanction of the Court under S. 29 There seems, however, to be no warrant for the view of the learned Judges that where there is proof of legal necessity for the major portion of the consideration for a mortgage bond, the Court can presume legal necessity in respect of the small balance for which there is no actual proof. The judgment lays this down on the authority "of the latest decision of the Judicial Committee" but the exact reference is not given. If it is intended to refer to the decisions in *Sri Krishn Das* v. *Nathu Ram*[9] and *Niamat Rai* v. *Din Dayal*[10] it may be pointed out that those were cases of sales and not mortgages. In the case of sales, the question is "whether the sale itself is justified by necessity." So far as the mortgage is concerned, the necessity should be made out for the amount borrowed.

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6. (1922) I.L.R 45 M. 429: 42 M.L.J. 333. 7. (1926) 51 M.L.J. 869.
8. (1884) L.R. 12 I.A. 47: I.L.R. 11 C. 379 (P.C.).
9. (1926) L.R. 54 I.A. 79: I.L.R. 49 A. 149: 52 M.L.J. 120 (P.C.).
10. (1927) L.R. 54 I.A. 211: I.L.R. 8 Lah. 597: 52 M.L.J. 729 (P.C.).

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NOTES OF RECENT CASES.

Kumaraswami Sastri, J. C.S. Nos. 387 and 388 of 1925.
5th December, 1928.

Part performance—Doctrine of—Absence of contract of sale—Applicability—Limitation Act, Art. 91—*Starting point of limitation.*

The doctrine of part performance can only be applied to a case where there is a contract between the parties and everything has been done except the execution of a conveyance.

The starting point of limitation for Art. 91 of the Limitation Act is the date when the undue influence ceased.

S. Duraiswami Aiyar and *K. S. Rajagopala Aiyangar* for Plaintiff.

T. R. Venkatrama Sastri, V. Radhakrishniah, A. Visvanatha Aiyar and *V. Thyakarajan* for Defendants.

N. S.

Jackson and Reilly, JJ. S.A. No. 112 of 1926.
10th December, 1928.

Contract—Stranger—Right to sue on—Person in whose favour charge has been created.

Though a stranger to a contract cannot sue on it, if a charge has been created in his favour, he can enforce the charge by a suit.

Where an award was made in terms of a razinamah by which a charge was created for a certain amount in favour of a person who was not a party to the suit in which the reference to arbitration was made, *held,* that he or his representatives could institute a suit to enforce the charge.

6 A. 322 distinguished.

32 A. 410, 33 M. 238 and 22 M.L.J. 159 referred to.

B. Sitarama Rao and *S. Nataraja Nadar* for Appellant.

R. Kuppusami Aiyar for Respondent.

N. S.

Odgers and Venkatasubba Rao, JJ. S.A. No. 859 of 1925.
10*th December*, 1928.

Hindu Law—Joint family—Sole surviving coparcener—Gift by—Subsequent adoption by the widow of a previous coparcener—Adopted son if can question the gift.

Where, in a joint Hindu family consisting of a father and son, the son died leaving behind him a widow, authorising her to adopt, and, before the adoption, the father who became the sole surviving coparcener gifted some of the joint family properties in favour of his daughters and, subsequently, the widow of the son adopted a boy in pursuance of her husband's authority

Held, that the rights of the adopted son did not relate back to the death of his adoptive father so as to invalidate the alienation of the sole surviving coparcener and that the alienation was binding on him.

22 M.L.J. 85 followed.

1 Mad. 64 (P.C.), 43 Bom. 178 and 41 Mad. 855 explained.

S. Varadachariar and *A. Satyanarayana* for Appellants.

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for Respondents.

N. S.

Phillips and Odgers, JJ. C.M.P. No. 2776 of 1928.
11*th December*, 1928.

Civil Procedure Code, S. 110*—Valuation of appeal below Rs.* 10,000 *and memo of objections above Rs.* 10,000*—Appeal allowed but memo dismissed—Subject-matter same in both—Judgment if a reversing one.*

Where an appeal and a memo of objections were filed in the High Court against the decree of the Lower Court and the valuation of the appeal was about Rs. 7,000, but that of the memo of objections was over Rs. 10,000, and the subject-matter involved in both the appeals and the memo was the same, and the High Court, allowed the appeal and dismissed the memo of objections,

Held, (on an application by the respondent in the appeal for leave to appeal to the Privy Council), that the judgment of the High Court was a reversing one and leave to appeal ought to be granted.

N. S. Srinivasa Aiyar for Petitioner.

T. M. Krishnaswami Aiyar and *M. S. Venkatarama Aiyar* for Respondent.

N. S.

Ramesam and Venkatasubba Rao, JJ. C.R.P. No. 1644 of '27, etc.
11*th December*, 1928.

Court Fees Act, Ss. 17 (1) *and* 17-*A—Order of Hindu Religious Endowment Board—Application to set aside—Court-fee payable.*

The proper Court-fee payable on an application to set aside an order of the Hindu Religious Endowment Board under S. 84 (2) of the Religious Endowment Act is Rs. 15 under Article 17 (1) of the Court Fees Act and not Rs. 100 under Art. 17-A.

P. G. Krishna Aiyar and others for Petitioners.

P. Venkatramana Rao for Respondents.

N. S.

Ramesam and Venkatasubba Rao, JJ. A.S. No. 354 of 1924
11*th December*, 1928.

Civil Procedure Code, Order II, Rule 2—Instalment mortgage bond—Provision for calling entire amount on default of one instalment—Additional provision for enhanced rate of interest—Suit for recovery of amount of an instalment—Reservation of right to sue for subsequent instalments—Subsequent suit for later instalments—If barred.

A mortgage for Rs. 5,000 provided for the re-payment of the amount by four yearly instalments with interest at 8 per cent. per annum. It contained a further clause to the effect that, if default was made in payment of any instalment of principal or interest due thereon, the provision as to payment by instalment should have no effect and the mortgagor should be liable to pay the entire amount due under the mortgage irrespective of the instalment dates, and that interest on the overdue instalment should be payable at 10 per cent. Default was made in the payment of first instalment and thereupon the mortgagee instituted a suit to recover the first instalment of Rs. 1,250 and the interest Rs. 400, together with interest at 10 per cent. on the aggregate amount from the date when the instalment became due and obtained a mortgage decree. In the plaint in this suit, the mortgagee stated that he waived the right to call the entire amount and reserved his right to sue for subsequent instalments as and when they should become due. Subsequently the mortgagee filed the present suit to recover the amount due after the expiry of the periods prescribed for the subsequent instalments.

Held, that the suit was not barred by Order II, Rule 2 of the Civil Procedure Code.

A. I. R. 1928 Mad. 705 distinguished.

B. Sitarama Rao for Appellant.

K. Bhashyam Aiyangar for *K. P. Sarvothama Rao* for Respt.

N. S.

The Chief Justice and Jackson, J. O. S. A. No. 28 of 1927.
11*th December*, 1928.

Contract Act, S. 91—Scope of—Contract to the contrary—If can prevail—Course of dealings between the parties.

Section 91 of the Contract Act must be read subject to a contract, express or implied, to the contrary.

Where the course of dealings between the parties showed that, whenever an order was received to send silver, it was always sent uninsured at owner's risk by railway, and the consignor sued the consignee for the price of silver sent uninsured by railway and it was proved that he had delivered silver to the railway,

Held, that the consignee was liable for the price though he did not receive silver, an iron parcel having been substituted for the silver parcel subsequent to the receipt of the silver parcel by the railway.

V. V. Srinivasa Aiyangar, K. V. Krishnaswami Aiyar and *N. Swaminathan* for Appellant.

Vere Mockett and *G. Rajagopalan* instructed by *N. T. Shamanna* for Respondent.

N. S.

Phillips and Thiruvenkatachariar, JJ.
14th December, 1928.

A.S. No. 337 of 1926.

Hindu Law—Joint family—Family business—Suit for partition by a member—Right to a share of profits subsequent to suit—Future profits—Deduction for labour and skill of other partners—Election—When binding.

In the case of a trade carried on by a joint family as a family business, a member of the family is entitled at his option either to claim his share in the partnership assets as on the date of his suit for partition together with interest thereon or to claim his share in the future profits of the business subsequently carried on by the defendants.

4 L.W. 521 not approved.

23 Bom. 544 (P.C.) and 42 C. 914 (P.C.) referred to

An election by a person, in order to be binding on him, should be made at the time when he had full and complete knowledge of the two alternatives between which he was electing.

In ascertaining the future profits to which a retiring partner would be entitled, some allowance should be made for the labour and skill of the other partners utilised in the business.

T. M. Krishnaswami Aiyar and *S. Anantarama Aiyar* for Appellant.

S. Varadachariar, K. R. Rangaswami Aiyangar and *N. Sivaramakrishna Aiyar* for Respondents.

N. S.

Jackson and Reilly, JJ. S. A. Nos. 1434 to 1438 of 1925.
12th December, 1928.

Inam—Pre-settlement inam—Original grant by predecessor of Zemindar—Possession of inamdar till enfranchisement by Government—Validity of enfranchisement by Government—Right of Zemindar—Madras Act II of 1894, *Section* 17.

Village service inams granted prior to the permanent settlement were in the nature of lakhiraj grants and were not taken into account in fixing the peishcush.

11 L.W. 186 followed.

Where, in the case of a pre-settlement inam originally granted by a predecessor of the Zemindar, the inamdar was not disturbed until the enfranchisement of the inam by the Government, the inam must be deemed to have been continued within the meaning of Section 17 of Act II of 1894 and the enfranchisement by the Government will be valid.

Section 17, proviso 2 applies only to cases of registered proprietors and not to cases of pre-settlement inams.

G. Lakshmanna, P. Venkatramana Rao and *Y. Govindarajulu* for Appellant.

The Advocate-General for Respondent.

N. S.

The Chief Justice and Jackson, J. O.S.A. No. 13 of 1928.
13th December, 1928.

Civil Procedure Code, Order 21, *Rules* 16 *and* 53—*Assignment of decree—Subsequent attachment of the decree—If confers any rights.*

An attachment of a decree after it has been assigned by the decree-holder does not give any rights to the attaching decree-holder in the decree attached. Order 21, Rule 53 of the Civil Procedure Code is not self-contained and exhaustive and the omission to mention the assignee decree-holder in that Rule does not take away his rights under Order 21, Rule 16.

V. V. Srinivasa Aiyangar, A. V. Seshayya and *A. P. Sundarachariar* for Appellant.

Vere Mockett, K.S. Krishnaswami Aiyangar, G. Rajagopalan and *P. Thiruvengadaswami Mudaliar* for Respondent.

N. S.

The Chief Justice,
Madhavan Nair and
Jackson, JJ. Appeal Nos. 155 and 208 of 1923.
13th December, 1928.

Hindu Law—Adoption—Death of consenting sapinda—Adoption if invalidated.

An adoption made by a mother after the death of the son who gave her consent to adopt is not invalid on the ground that it was made after the death of the consenting sapinda. Test to be applied in such cases pointed out.

A. Krishnaswami Aiyar, B. Satyanarayana and *Y. Suryanarayana* for Appellant in Appeal No. 155 and 2nd respondent in Appeal No. 208 of 1923.

T. M. Krishnaswami Aiyar and *A. Venkatachalam* for 1st Respondent in Appeal No. 155 and Appellant in Appeal No. 208 of 1923.

P. Somasundaram for 2nd Respondent in Appeal No. 155 and 2nd respondent in Appeal No. 208 of 1923.

P. R. N.

Phillips and Odgers, JJ. C.M.P. Nos. 2847 to 2853 of 1928.
14th December, 1928.

Civil Procedure Code, S. 109—*Final order—Order of remand.*

Where a scheme suit under section 92 of the Civil Procedure Code was dismissed by the trial court on the preliminary ground that the temple was a private temple but, on appeal, this decision was reversed and the suit was remanded to the trial court for decision on the other issues,

Held, that this order of remand was not a final order within the meaning of section 109 of the Civil Procedure Code.

13 Mad. 349 followed.

43 M.L.J. 758 not approved.

T. M. Krishnaswami Aiyar for *K. P. M. Menon* and *K. P. Krishna Menon* for Petitioner.

The Advocate-General and *C. S. Swaminathan* for Respondent.

N. S.

Ramesam, Jackson and Reilly, JJ. S. A. No. 923 of 1925
20th December, 1928. and C. R. P. No. 991 of 1925.

Hindu Law—Joint family—Partition suit by son against father—Marriage expenses of plaintiff's sisters—Liability of plaintiff's share to be charged for—Origin of the rule.

Held, (Jackson, J., dissenting), that under the Hindu Law a son claiming partition from his father is liable to pay out of his share to be allotted on partition for the marriage expenses of his sisters who are unmarried at the time. Such liability is not cast solely on the father; where the father incurs expenses in respect of the marriage of a daughter pending the partition suit, such expenses also ought to be provided for in the decree to be passed in the suit. Distinction between the case of a daughter and a son's

daughter pointed out. Origin of the Hindu Law rule providing for the marriage expenses of daughters traced.

P. Satyanarayana for Appellant in S.A. No. 923 and C.R.P. No. 991 of 1925.

Ch. Raghava Rao for Respondent in S.A. No. 923 and Petitioner in C. R. P. No. 991 of 1925.

P. R. N.

The Chief Justice,
Odgers and Beasley, JJ. O.P. No. 202 of 1928.
21st December, 1928.

Income-tax Act (1922), *Ss.* 8, 10 *and* 60—*Government securities—Interest on investments in—Liability to income-tax.*

Where a Bank claimed exemption from income-tax in respect of interest on investments in Government securities by reason of the notification under S. 60 of the Income-tax Act exempting the profits of Co-operative Societies from such investments:

Held, that such investments did not form part of the business of the Bank, and that the interest or income from such investments was liable to income-tax as income from securities under S. 8 of the Income-tax Act.

M. Subbaroya Aiyar for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.
P. R. N.

Tiruvenkatachariar, J. C.R.P. No. 1679 of 1927.
21st December, 1928.

Indian Limitation Act, Ss. 20 *and* 21—*Promissory note—Part payment by one of the co-heirs of the maker—Saving of limitation for suit on the note against all the co-heirs.*

Part payment of the principal or of interest as such under a promissory note by any one of the co-heirs of the maker of the note will have limitation against all the heirs of the maker and not only against the person who makes the payment.

37 Cal. 461, 1927 All. 209 and 24 M.L.J. 66 followed.

14 I.C. 128 dissented from.

Case-law reviewed.

C. A. Seshagiri Sastri for Petitioner.

K. S. Desikan for Respondents.

Phillips and Tiruvenkatachari, JJ. C.M.A. No. 78 of 1926.
21st December, 1928.

Procedure—Appeal to High Court—Bench of two Judges—Difference in opinion—Result—Civil Procedure Code, S. 98—Letters Patent, clause 36.

The following question was referred to a Full Bench:—

"Where, in an appeal heard by a Bench of two Judges of the High Court, the Judges differ in opinion, whether the procedure applicable will be that provided by section 98 of the Civil Procedure Code or clause 36 of the Letters Patent."

T. M. Krishnaswami Aiyar and *P. Somasundaram* for Appellant.

K. S. Krishnaswami Aiyangar and *C. Rama Rao* for Respondents.

N.S.

Waller and Jackson, JJ.
10th January, 1929. S. A. No. 1448 of 1925.

Limitation Act, Art. 134—*Essentials for applicability.*

For the purpose of the applicability of Art. 134 of the Limitation Act it is sufficient that the transferee purchased under the belief that the full proprietory rights were transferred to him.

T. L. Venkatrama Aiyar for Appellant.

T. R. Ramachandra Aiyar and *M. Balasubramania Mudaliar* for Respondent.

N.S.

Venkatasubba Rao and Reilly, JJ. C.R.P. No. 698 of 1927.
11th January, 1929.

Negotiable Instruments Act, Ss. 29 *and* 120—*Promissory note by minor—Validity.*

Section 120 of the Negotiable Instruments Act must be read subject to section 29 and consequently a minor executant of a promissory note is not barred from raising the plea of minority in a suit upon the note.

M. N. Duraiswami Aiyangar for Petitioner.

L. S. Veeraraghava Aiyar for Respondent.

N.S.

Wallace and
Madhavan Nair, JJ. C. M. A. No. 347 of 1928.
16th January, 1929.

Civil Procedure Code, Order 21, *Rule* 66—*Order by the Executing Court fixing a certain market value and upset price—If appealable.*

An order by the Executing Court fixing the market value and upset price of the property to be sold and fixing the sale by lots under Order 21, Rule 66 of the Civil Procedure Code is not appealable.

27 Mad. 259 (F.B.) followed.

Cases reviewed.

K. S. Jayarama Aiyar for Appellant.

K. Bhashyam Aiyangar and *T. S. Subramania Aiyar* for Respondent.

N.S.

Madhavan Nair and
Jackson, JJ. C. M. P. No. 5352 of 1928.
16th January, 1929.

Civil Procedure Code, Sections 109 (*c*) *and* 110—*Suit decreed as regards some items and dismissed as to the rest—Appeal by defendant—Memo. of objections by plaintiff—Allowing of appeal and dismissal of memo. of objections—Application for leave to appeal by plaintiff—Decree of High Court whether one of variance or confirmance—Valuation of subject-matter of suit—Value given in the plaint—If and when can be re-opened—Interest accrued due subsequent to date of suit—If can be included—Construction of Will—If and when a substantial question of law—Special leave to appeal.*

Where a suit to recover various items of properties was decreed in respect of some of the items and dismissed as regards the rest, and the defendant preferred an appeal to the High Court as regards the items decreed and the plaintiff filed a memorandum of objections as regards the items disallowed to him, and the High Court allowed the appeal and dismissed the memo. of objections,

Held (on an application by the plaintiff for leave to appeal to the Privy Council), that the judgment of the High Court was a reversing judgment as the decree of the Lower Court was reversed as regards a number of items and the question involved in the appeal and the memo. of objections was a common question.

Held also that, in calculating the valuation of the subject-matter of the suit, the valuation given in the plaint by the applicant should be taken as final and the applicant cannot be allowed to re-open the same unless a *bona fide* mistake is established.

N R C

Held further that interest which has accrued subsequent to the date of the suit on the outstandings sought to be recovered in the plaint cannot be taken into account for the purpose of calculating the valuation of the subject-matter of the suit.

Where the construction relating to a Will is clear and the law relating thereto is well settled, the question as to the construction of the Will cannot be said to be a substantial question of law as to entitle a person to get special leave to appeal under Section 109 (*c*) of the Civil Procedure Code.

T. V. Venkatrama Aiyar, T. V. Ramanatha Aiyar and *P. S. Srinivasa Aiyangar* for Petitioner.

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar* for Respondent.

N.S.

The Chief Justice and Ananthakrishna Aiyar, J.
18th January, 1929.

O. S. A. No. 109 of 1928.

Civil Procedure Code, Order 21, *Rule* 89—*Amount to be paid to set aside sale—Enhanced rate of interest subsequent to sale proclamation agreed upon by the judgment-debtor—If should be paid.*

Under Order 21, Rule 89 of the C. P. Code, the only amount that should be paid to set aside the sale is the amount mentioned in the sale proclamation and the 5 per cent. ; any increased rate of interest subsequent to the sale proclamation agreed to be paid by the judgment-debtor need not be paid in order to entitle him to have the sale set aside.

K. S. Krishnaswami Aiyangar and *T. Krishnaswami Aiyangar* for Appellant.

A. Suryanarayaniah, V. C. Gopalratnam and *Mahomed Ibrahim Sahib* for Respondent.

N.S.

Wallace and Madhavan Nair, JJ. C.M.A. No. 37 of 1928.
15th January, 1929.

Civil Pro. Code, Ss. 2 (2), 11 *and* 47—*Mortgage decree—Execution—Application by purchaser of equity of redemption to be made a party—Time for filing counter by mortgagor refused—Application ordered—Subsequent petition by mortgagor that purchase benami for decree-holder—Dismissal of petition—Subsequent petition by mortgagor for non-recognition of the other person as purchaser—Amendment of prayer into a different one—Preliminary objection by decree-holder—Order overruling preliminary objection and deciding to hear the merits—If amounts to a decree—Appeal—Revision—Prior order—Finality and effect of—Constructive* res judicata—*Interference in revision—Breach of processual law.*

In the course of the execution of a mortgage decree an application was put in by a person alleging himself to be the purchaser of the equity of redemption to be made a party. The mortgagor who wanted to put in an objection requested for time to file a counter but it was refused and the application was ordered. Subsequently the mortgagor put in another application alleging that the purchase was really benami for the decree-holder but this also was dismissed. The mortgagor then put in another application for non-recognition of the other person as purchaser on the very same grounds as before and the prayer was subsequently amended to one for a declaration that as the purchase had been satisfied no execution should issue. A preliminary objection was raised that the mortgagor had no *locus standi* to put in this application and that the prior orders operated as *res judicata.* The Court overruled the preliminary objections and decided to dispose of the application on the merits. Against this order an appeal and a revision petition were preferred to the High Court by the decree-holder.

Held (1) that the appeal was not maintainable, as the order did not amount to a decree, being only an interlocutory order not disposing of the petition,

(2) that the prior orders passed on the mortgagor's petition for want of evidence were judicial orders and final, though the principle of constructive *res judicata* would not apply as the present prayer was different from the prayer in the previous petitions,

(3) that the High Court could interfere in revision as there had been a breach of the processual law.

T. Rangachariar and *B. C. Seshachala Aiyar* for appellant.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for respondent.

N.S.

NRC

Venkatasubba Rao and Reilly, JJ.
17th January, 1929.

C.M.A. Nos. 6 of 1925 and 310 to 312, 313 of 1925, C.R.P. Nos. 173 and 174 of 1925 and 628 and 627 of 1924.

Provincial Insolvency Act, Ss. 27 (2), 37 *and* 43—*Scope of—Time fixed for discharge—Application to set aside alienation as fraudulent preference—Expiry of time fixed for discharge—Absence of application for extension of time—Order of annulment by Court—Power of Official Receiver to prosecute the petition for setting aside the alienation.*

Section 43 does not operate so as to annul the adjudication automatically unless an order under the section is passed.

51 C. 337 referred to.

The Insolvency Court has jurisdiction to entertain an application for extension of time under section 27 (2) of the Act where the time originally fixed for discharge has expired.

17 C. 502 (P.C.) referred to.

Where no application for extension of time for discharge is put in either by the debtor or the creditor, the Court is not obliged to annul the adjudication unconditionally and when the Court annuls it, it should have regard to section 37; if an application to have an alienation set aside as a fraudulent preference is pending, the Court should not pass an unconditional order of annulment but must pass an order vesting the property in the Official Receiver under section 37.

Per *Venkatasubba Rao, J.*—Where a petition to have an alienation by an insolvent set aside as a fraudulent preference is pending and the Court passes an order of annulment, the Official Receiver in whom the property would be vested in section 37 can continue the prosecution of the petition.

Section 43 of the Act is controlled by the provisions of section 27 (2).

Per *Reilly, J.*—The word "shall" in section 43 of the Act is not equivalent to "may."

A. Krishnaswami Aiyar and *V. Govindarajachari* for appellant.

S. Srinivasa Aiyangar, B. Somayya, Kasturi Seshagiri Rao, M. Ranganatha Sastri, Court guardian and *V. Suryanarayana* for respondents.

N.S.

Ramesam and Jackson, JJ. A.S. Nos. 340 of 1924 and
21st January, 1929. 204 of 1925.

Contract Act, S. 263—Assignment by one of the partners of his share—Notice of assignment by the assignee to the partners—Subsequent settlement of accounts by the partners behind the back of the assignee—If binding on the assignee—Rate of conversion of dollars into rupees.

After the assignee from one of the partners of his share in the partnership business has given notice of the assignment to the partners, if the partners enter into a settlement of accounts behind the back of the assignee, it is not binding on the assignee, especially, if the valuation given to the inams in the settlement have not been arrived at by means of sale by public auction but the inams have been taken over by one of the partners.

The proper rate of conversion of dollars into rupees in the case of a claim by a partner or his assignee for his share in the partnership business carried on in the Federated Malay States is that prevailing on the date when the amount due to the plaintiff was ascertained and made known to him.

T. M. Krishnaswami Aiyar and *M. Subbaroya Aiyar* for appellant.

S. Varadachariar and *K. S. Venkataraman* for respondent.

N.S.

Venkatasubba Rao and Reilly, JJ. L.P.A. No. 12 of 1925.
21st January, 1929.

Mortgage—Usufructuary mortgage—Provision for payment of a certain amount to the mortgagor and the appropriation of the rest towards the mortgage—Purchase of the equity of redemption by another before the expiry of the period when mortgage would be discharged by the appropriation—Duty of mortgagee to appropriate the whole of the usufruct towards the mortgage—Words—Cowle—Meaning of.

An usufructuary mortgage was executed in 1865 under which the mortgagee was to pay, out of the yearly income of Rs. 240, Rs. 100 for Kattubadi, etc., appropriate Rs. 80 towards the loan and pay the balance of Rs. 60 to the mortgagor for his maintenance. In this way the entire mortgage would be wiped off in 55 years. In 1882 the equity of redemption was purchased by a third person in execution of a money decree against the mortgagor and he brought a suit for possession of the properties against the mortgagee in 1913 before the expiry of the 55 years. The defendant pleaded that the transaction evidenced by the document was a lease and not a mortgage as the word "Cowle" was used and that in any event the plain-

tiff was not entitled to ask the defendant to appropriate the sum of Rs. 60 payable to the mortgagor also towards the mortgage.

Held (1) that the word "Cowle" generally meant an agreement or a contract and was not restricted to denoting a lease only and that the transaction was a usufructuary mortgage and not a lease.

(2) that the term in the document providing for the payment of Rs. 60 to the mortgagor was not an independent covenant enforceable otherwise than as a term in the mortgage and cannot be treated as a personal allowance in favour of the mortgagor and therefore the plaintiff was entitled to call upon the defendant to appropriate this sum of Rs. 60 in redemption of the mortgage debt after the date of his purchase.

G. Lakshmanna and *M. Appalacharya* for appellants.

S. Varadachariar, P. Somasundaram and *N. Rama Rao* for respondent.

N.S.

Odgers and Wallace, JJ. S.A. No. 257 of 1925.
25th January, 1929.

Limitation Act, Art. 47—Possession proceedings between manager of a joint family and another—Order thereon—If binds the other members of the family.

Where a Hindu father acted as manager of a joint Hindu family in proceedings under section 145 of the Criminal Procedure Code, and the other members of the family, though they were not parties to those proceedings, were aware of the proceedings.

Held, that the order in those proceedings would be binding not only on the father but also on the other members of the family and therefore a suit by any member of the family to recover possession of the properties would be governed by Art. 47 of the Limitation Act.

The Advocate-General and *V. Govindarajachariar* for appellant.

S. Varadachariar, A. Satyanarayana, P. Somasundaram, S. Narayana Aiyangar and *B. V. Ramanarasu* for respondent.

N.S.

Phillips and Madhavan Nair, JJ. A.S. No. 211 of 1926.
25th January, 1929.

Hindu Law—Joint family—Partition suit by father along with his minor son against his own father and step-brother—Death of grandfather subsequent to suit—Right of minor sons to plead that the partition as regards his share should not be ordered.

A suit for partition was filed by a person along with his minor sons against his father and step-brother. The grandfather died subsequent to the suit and the minor son contended that he would be entitled to a larger share due to the death of the grandfather and therefore it was not to his interest that he should be treated as having become divided in status from the date of the institution of the suits.

Held, that a person can withdraw the declaration of his intentive made in the plaint and in the case of a minor, if the Court found that it was detrimental to the interests of the minor for the partition suit to be proceeded with, the Court is entitled to disregard the plaint for partition filed on his behalf, and that as the declaration of his intention to be divided was not carried into effect by the passing of a decree there was nothing to prevent the minor from withdrawing his plaint for partition and the Court would give effect to it, if it was of opinion that it would be prejudicial to the interests of the minor by continuing the suits.

T. M. Krishnasami Aiyar for appellant.

T. R. Ramachandra Aiyar, B. Sitarama Row, S. R. Muthusami Aiyar, R. Kesava Rao and *V. Ramasami Aiyar* for respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 33 to 36 of 1926.
29th January, 1929.

Limitation Act, Art. 134—*Valuable consideration—Mere reservation of rent—Transfer of Property Act, S.* 51—*Applicability to permanent leases.*

A mere reservation of rent in a permanent lease deed is not a valuable consideration within the meaning of Art. 134 of the Limitation Act.

44 Mad. 831 referred to.

Section 51 of the Transfer of Property is applicable in the case of permanent lease.

P. R. Ganapathi Aiyar and *A. Venkatachellam* for appellant.

G. Lakshmanna and *B. T. M. Raghavachari* for respondent.

N.S.

N R C

Ramesam and Jackson, JJ.
31*st January*, 1929.

A.S. Nos. 186 of 1923 and 76, 77 and 106 of 1926.

Mahomedan Law—Religious Endowment—Durga—Appointment of Mutawalli—Intentions of founder—Meaning of words "batuam bad batuam" *and* "naslam bad naslam"—*Descendants of daughters whether members of the family—Right of women to succeed.*

On a question of appointment to the mutawalli office in a Mahomedan *durga* the intentions of the founder may be considered by the Court, but subject to this there is no absolute right to the office in any particular member of the family.

34 Cal. 118 (P.C.), 43 Cal. 467 and 38 Mad. 491 relied on.

The words *"batuam bad batuam"* and *"naslam bad naslam"* mean generation after generation. Those words may exclude cognates in the case of private grants but the same consequence does not follow where they occur in documents dealing with managership of wakfs. There the words should be taken literally so as to include daughter's sons. The descendants of females are also members of the family and heirs under the Mahomedan Law and may consequently be appointed to the office of mutawalli.

10 Bom. H. C. R. 7; 16 W. R. 193 not followed.

In the case of succession to the Mutawalli office women are not necessarily excluded but they will not generally be appointed where a competent male member of the family is available.

T. R. Venkatarama Sastri and *B. V. Viswanatha Aiyar* for appellant in A.S. No. 186 of 1923.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for appellant in A.S. No. 76 of 1926.

L. A. Govindaraghava Aiyar for appellant in A.S. No. 77 of 1926.

T. Rangachariar and *K. S. Sankara Aiyar* for appellant in A.S. No. 106 of 1926.

B. Sitarama Rao and *N. Swaminatha Aiyar* for 2nd respondent.

S. Varadachariar, K. Narasimha Aiyangar and *Mahomed Kabir Khan* for 10th respondent.

B. Pocker for 8th and 9th respondents.

N.S.

Phillips and Wallace, JJ. C. M. A. No. 241 of 1927.
1st February, 1929.

Civil Procedure Code, Order 13, *Rule* 4—*"Admitted in evidence"—Meaning of—Mere affixture of initials of judicial officer with a facsimile of rubber stamp—If amounts to admission of the document.*

Where, in a suit on a hundi, the hundi was marked as an exhibit with the usual endorsement "admitted in evidence", and the facsimile initials of the District Munsif was also affixed on the document, but the document was subsequently rejected for non-cancellation of the stamp,

Held, (1) that such rejection was legal, as the words "admitted in evidence" in Order 13, Rule 4 of the Civil Procedure Code meant "letting the document in" as a result of the judicial determination of the question and not a mere mechanical admission; and (2) that affixture of the facsimile rubber stamp initials of the District Munsif was not a proper compliance with the provisions of Order 13, Rule 4, Civil Procedure Code.

Case-law discussed.

12 Bom. L. R. 466 : 6 I. C. 903 followed.

12 M. L. J. 351 distinguished.

Ch. Raghava Rao for Appellant.

P. Somasundaram for respondent.

N.S.

Ramesam and Jackson, JJ. A. S. Nos. 244 and 245 of 1922.
1st February, 1929.

Inam—Pre-settlement inam—Karnam's service inams—Public or private service inam—Presumption—Power of Government to abolish the service and resume the inam—Madras Permanent Settlement Regulation—Instrument of Instructions prepared before the Regulation—Admissibility.

A karnam's office is a public office and karnam service inams are public service inams and not private service inams.

In the case of pre-settlement inams, no inference can be drawn in favour of the inclusion of public service inams in the assets of the zemindari. In the case of such inams, the Government has power to continue or abolish at their pleasure any of the village public offices.

Instrument of Instructions prepared before the Madras Permanent Settlement Regulation was passed are not admissible in evidence in construing the Regulation.

N R C

The Government Pleader for Appellant.

The Advocate-General, A Venkatachalam and *P. Satyanarayana Rao* for Respondent.

N.S.

The Chief Justice and Jackson, J. O. S. A. No. 30 of 1928.
7th February, 1929.

Indian Companies Act—Fund incorporated under the Act—Share fixed at Rs. 100 *payable at one rupee per month for 7 years —Provision for sharcholder ceasing to be such after 7 years—If* ultra vires.

Where the Articles of Association of a Fund incorporated under the Indian Companies Act provided that its share capital fixed at Rs. 100 per share was payable in monthly instalment of Re. 1 for seven years and that thereafter his name would be taken from the registry of shares and he would cease to be a shareholder,

Held, that such a provision was *ultra vires* of the Memorandum of Association and the principles embodied in the Indian Companies Act and would amount to a reduction of the capital which would not be legal without the order of Court.

O. T. G. Nambiar instructed by *Messrs. King & Partridge* for Liquidator.

S. Duraiswami Aiyar, T. K. Rangaswami Aiyar, K. B. Ranganatha Aiyar, T. P. Kalyanaraman, A V. Seshayya, S. Rangachari and *K. Kuppuswami* for Contributories.

N.S.

The Chief Justice and Ananthakrishna Aiyar, J. O. S. A. No. 35 of 1927.
12th February, 1929.

Madras District Municipalities Act (V of 1920), *Section* 81—*Railway Company—Liability to property tax—Notification by Government of India specifying categories of taxes but not the rates—If* ultra vires.

The Madras and Southern Mahratta Railway Company is not liable to property tax under the Madras District Municipalities Act of 1920.

The notification issued by the Government of India in 1911 specifying the various categories of taxes to be levied by the Municipal Council against Railway Companies is *ultra vires* of the powers of the Government of India, as it did not make any reference to the sections of the Municipalities Act in which rates of tax were mentioned.

C. Sambasiva Rao for *T. R. Arunachalam* for Appellant.

R. N. Aingar instructed by *Messrs. King & Partridge* for Respondent.

N.S.

Ramesam and Jackson, JJ. A. S. No. 218 of 1927.
12th February, 1929.

Pleader and client—Gift by client to pleader—When valid.

A gift by a client to his pleader, while such relationship subsists, is invalid unless the pleader is in a position to show beyond all possible doubt that the client had independent advice and was not influenced in the slightest degree by the relationship.

The Advocate-General and *V. Govindarajachari* for Appellant.

S. Varadachariar for *S. V. Venugopalachariar* for Respondent.

N.S.

The Chief Justice, Odgers and Beasley, JJ. O. P. No. 152 of 1928.
15th February, 1929.

Income-tax Act (1922), *Sections* 2 (4) *and* 4 (2)—*"Business" —Growing, cultivating and manufacturing tea outside British India, if—Income from such operations, if assessable to income-tax.*

Where the assessee who owned a tea estate outside British India was carrying on the occupation of growing and cultivating tea on land and converting the green leaves into tea, and the income derived from such occupation was assessed to income-tax under Section 4 (2) of the Income-tax Act and the assessee contended that the income from the operations of growing and cultivating tea was agricultural income and as such exempt from income-tax, .

Held, that the growing, cultivating and manufacturing tea constituted business under Section 2 (4) of the Income-tax Act, and that the income from such operations was taxable under Section 4 (2) of the Act.

A. Krishnaswami Aiyar, M. Subbaroya Aiyar and *V. S. Venkatarama Aiyar* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N.S.

The Chief Justice, Odgers and Beasley, JJ. O.P. No. 134 of 1928
18th February, 1929.

Income-tax Act, Ss. 10 *and* 60—*Mutual Benefit Society—Meaning of—Co-operative Society purchasing and distributing produce to shareholders and paying devidend to members—If one carrying on business—Assessability to income-tax.*

Where a Co-operative Society which was incorporated in England under the English Industrial and Provident Societies Act of 1893, but not registered as a Co-operative Society in India under

section 60 of the Income-tax Act, the object of the Company being to distribute tea and other articles to the shareholders at a cheap price, and the Company grew and purchased produce and distributed them to its shareholders only,

Held, that the Company was a mutual benefit society and that the income derived by the Company was not assessable to income-tax.

M. Patanjali Sastri for Commissioner of Income-tax.

Nugent Grant instructed by *Messrs. King & Partridge* for Assessees.

P.R.N.

Kumaraswami Sastri, Ramesam and Reilly, JJ. C.M.A. Nos. 155 and 403 of 1926.
19*th February,* 1929.

Civil Procedure Code, S. 98 *and Letters Patent (Madras), cl.* 36 *—Applicability and scope—High Court Appeals—Difference of opinion among Judges—Procedure.*

Held, the procedure to be applied in the case of an equal division of opinion among Judges in all classes of appeals in the High Court is that laid down in clause 36 of the Letters Patent; and cl. 36 applies whether or not the appeal is from the Original Side of the High Court.

T. M. Krishnaswami Aiyar and *P. Somasundaram* for Appellant.

K. S. Krishnaswami Aiyangar and *C. Rama Rao* for Respondent.

P.R.N.

Kumaraswami Sastri and Ramesam, JJ. C.M.P. No. 3509 of 1928.
19*th February,* 1929.

Civil Procedure Code, S. 110*—Substantial question of law—Question of* res judicata.

Where two Courts have held that a suit is not barred by *res judicata,* it does not amount to a substantial question of law within the meaning of S. 110 of the Civil Procedure Code.

B. Somayya for Petitioner.

Ch. Raghava Rao, E. Krishnamurthi, A. Sundaram Aiyar and *V. K. Ramachandra Aiyar* for Respondents.

N.S.

Phillips and Reilly, JJ. O.S.A. No. 71 of 1928.
21*st February,* 1929.

Madras City Municipal Act—License Fee in respect of storage of foreign liquor—Increase by 800 *per cent.—Legality.*

Where the Corporation of Madras increased the license fee payable by Messrs. Spencer & Co. in respect of storage of foreign liquor from Rs. 25 to Rs. 200,

Held, that the power to collect the license fee was not the power of taxation under the Municipal Act as defined in Part III, Chapter V and that the sudden increase of the license fee by 800 per cent. should not be said to be a reasonable one and, therefore, was *ultra vires* of the powers of the Corporation.

S. Rangasami Aiyangar for Appellant.

Vere Mockett instructed by *Messrs. Short Bewes & Co.* for Respondent.

N.S.

Odgers, J. Cr.M.P. No. 791 of 1928.
22nd February, 1929.

Abkari Act—Complaint by a private individual—If entertainable.

Under the Abkari Act only a Collector or a Commissioner or a person authorised by the Local Government can proceed against persons who are alleged to have committed offences under the Act. No private person can file a complaint.

K. S. Jayarama Aiyar for Accused.

K. Venkataraghavachari for The Public Prosecutor.

N.S.

Waller and Krishna Pandalay, JJ. Cr.R.C. No. 914 of 1928.
25th February, 1929.

Madras Local Boards Act, Ss. 184 *and* 221*—Power of Union Board to provide for motor stand and levy a fee therefor—Power of Magistrate to decide about the legality of the fee.*

A Magistrate has got power to decide whether the levy of a fee by a Union Board for motor stand is *ultra vires* or not.

A Union Board as such has no power to levy a fee for a motor bus stand as distinguished from an ordinary stand for country carts. The bus stand cannot come under the term "public halting place" mentioned in S. 184 of the Local Boards Act.

S. Panchapakesa Sastri for Petitioner.

The Public Prosecutor for the Crown.

N.S.

The Chief Justice, Wallace and L.P.A. No. 312 of 1927.
Ananthakrishna Aiyar, JJ.
25th February, 1929.

Civil Procedure Code, S. 73 *and O.* 21, *R.* 11*—Construction—Rateable distribution—Conditions for granting of—Execution appli-*

cation not in strict conformance with O. 21, *R.* 11—*If disentitles applicant from sharing in the assets.*

Where in execution of a decree the appellant applied for attachment of a fund in Court standing to the credit of the respondent who had also filed a suit against the same judgment-debtor, and the Court ordered the attachment though the application was not in conformity with O. 21, R. 11, Civil Procedure Code, and the Court holding that there was no valid execution application, did not allow rateable distribution to the appellant under S. 73, Civil Procedure Code

Held, that the appellant having applied for execution of his decree before the receipt of assets as laid down in S. 73, Civil Procedure Code, it should not be said that there was no execution application, it having been acted upon by the Court though certain informal particulars were not complied with, and that the appellant was entitled to share rateably in the fund attached.

T. Krishnaswami Aiyangar for Appellant.

P.R.N.

Phillips and Reilly, JJ. A.S. No. 269 of 1926
26th February, 1929.

Hindu Law—Widow—Alienation—Consent of reversioner—Three reversioners—Consent of one—Effect.

The consent of even one of several reversioners to an alienation by a Hindu widow can raise the presumption of necessity for the alienation.

P. Venkataramana Rao for Appellant.

S. Varadachariar, V. Govindarajachari, M. Appalachari and *J. Lakshmayya* for Respondents.

N.S.

Venkatasubba Rao, J. S.A. No. 1506 of 1928.
26th February, 1929.

Madras Local Boards Act—Election for membership of Taluk Board—Nomination of more than one candidate by one person—Nomination of the same candidate by the same person twice—Legality—Rejection of nomination paper by Chairman—Suit for declaration that nomination paper valid and for injunction—Maintainability.

The spirit underlying the election rules framed under the Madras Local Boards Act is that one voter should not nominate more candidates than there are vacancies and not that he should not subscribe to several nomination papers of the same candidate.

A suit for a declaration that a nomination paper is valid and was wrongly rejected by the Chairman and for an injunction restraining the Chairman from holding an election without the plaintiff as a candidate is maintainable.

P. Venkataramana Rao and *A. Lakshmayya* for Appellant.

Ch. Raghava Rao and *D. Krishnaswami* for 1st and 2nd Respondents.

N.S.

Kumaraswami Sastri, Ramesam and Reilly, JJ. L.P.A. No. 202 of 1925.
26th February, 1929.

Letters Patent (Madras), Amended cl. 36—If retrospective.

Held, by the Full Bench, that the amended clause 36 of the Letters Patent (Madras) was retrospective in operation and applied to all appeals pending in the High Court at the time when the amended clause came into force.

The Advocate-General and *K. Balasubramania Aiyar* for Appellant.

K. V. Krishnaswami Aiyar, T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Respondent.

P.R.N.

The Chief Justice and Ananthakrishna Aiyar, J. L.P.A. No. 229 of 1925.
27th February, 1929.

Madras Civil Courts Act, S. 11*—Power of District Judge to allocate work to Additional Courts—Notification that Additional Court has no power to execute decree—Effect.*

Where an Additional Munsif Court was constituted by a notification of a High Court and was given jurisdiction to dispose of such suits and applications as were transferred to it by order of

the District Judge, and a suit was decreed by the Additional Court but the decree-holder applied for execution to the Principal Court relying on a notification of the District Judge,

Held, that the District Judge was empowered to issue such a notification by virtue of the notification of the High Court and S. 11 of the Civil Courts Act and therefore the execution application made to the Principal Court was one made to a proper Court and would save litigation.

C. S. Venkatachariar and *H. Suryanarayana* for Appellant.

K. Bhashyam Aiyangar and *B. Jagannadha Doss* for Respondents.

N.S.

The Chief Justice and Ananthakrishna Aiyar, J.
28th February, 1929.

L.P.A. No. 275 of 1925.

Practice—Second Appeal—Interference in with finding of fact—Justifiability.

Where, in a suit for damages for wrongful dismissal from service, the District Judge on appeal held that the plaintiff had been wrongfully dismissed, and in Second Appeal to the High Court, the learned Judge sitting in Second Appeal reversed that finding on the ground that there was not sufficient evidence to support the finding:

Held, on Letters Patent Appeal, that the finding of the District Judge about the wrongful dismissal of the plaintiff, being a question of fact, the High Court was not justified in Second Appeal in going into the evidence to see if the finding was correct or not, however unsatisfactory the finding might be, and that the order reversing the District Judge's decision ought to be set aside.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellant.

K. Bhashyam Aiyangar and *T. S. Srinivasa Aiyar* for Respondent.

P.R.N.

Kumaraswami Sastri, J. Application No. 296 of 1929.
4th March, 1929.

Civil Procedure Code, O. 33, *R.* 1—*Suit in* forma pauperis *by the Official Assignee—Maintainability.*

The Official Assignee can institute a suit in *forma pauperis;* the fact that he has property in one capacity does not preclude him from instituting the suit in another capacity.

V. Varadaraja Mudaliar for Official Assignee.

N.S.

Phillips and Reilly, JJ. A.S. No. 428 of 1922.
4th March, 1929.

Jurisdiction—British Indian Court—Suit for declaration that adoption of French subject by another French subject is not valid—Certain properties of the adopted son situated in British India—Maintainability of suit.

Where a suit was brought in a British Indian Court for a declaration that an adoption of a French subject by another French subject is invalid and it appeared that certain of the properties to which the alleged adopted son could lay claim were situated within British India,

Held, that the suit was not maintainable and should be dismissed, as the determination of the question relating to adoption stood on the same footing as that of a person's legitimacy and was a question of status.

The Advocate-General, B. Satyanarayana and *C. Rama Rao* for Appellant.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for Respondents.

N.S.

Phillips and Krishna Pandalay, JJ. C.M.A. No. 418 of 1927.
6th March, 1929.

Mortgage—Construction—"Ayavesu"—Meaning of.

Where a mortgage deed provided for discharge of the mortgage debt by sale of the mortgage lands and from the *Ayavesu,* and, the sale of the mortgage properties being insufficient to discharge the mortgage amount in full, the decree-holder applied for attachments of certain rent decrees obtained by the purchaser of the mortgaged lands against the tenants in possession,

Held, that the mortgage deed having created a charge over the future produce as well, the charge fastened itself on the substituted security, namely, the rent decrees and therefore the attachment was proper and valid.

N R C

T. M. Krishnaswami Aiyar for *The Advocate-General* and *V. Pattabhirama Sastri* for Appellant.

B. Satyanarayana for Respondents.

N.S.

Odgers, J. Cr.M.P. No. 129 of 1929.
7th March, 1929.

Contempt proceedings—Jurisdiction of High Court to award costs.

The High Court has inherent jurisdiction to award costs in contempt proceedings.

T. R. Ramachandra Aiyar for *C. Narasimhachari* for Petitioner.

Nugent Grant for *J. A. Pinto* for Respondent.

N.S.

Waller and Anantakrishna Aiyar, JJ. Cr.A. No. 707 of 1928
11th March, 1929.

Penal Code, S. 149—*Offence—If includes an offence under the Railways Act.*

The term "offence" in S. 149, Indian Penal Code, does not comprise an offence under the Railways Act.

20 L.W. 914 referred to.

V. L. Ethiraj and *D. Ramaswami Aiyangar* for Accused.

K. N. Ganapathi for The Public Prosecutor.

N.S.

Waller and Anantakrishna Aiyar, JJ. Cr.R.C. No. 34 of 1929.
12th March, 1929.

Criminal Procedure Code, S. 195—*Public servant charged with offence—Sanction to prosecute—If necessary.*

A public servant charged with an offence committed while purporting to act in the discharge of his official duty cannot be prosecuted without sanction to prosecute.

52 M.L.J. 647 and 56 M.L.J. 293 not followed.

9 M. 437 followed.

B. T. M. Raghavachari for Accused.

The Public Prosecutor for the Crown.

Ch. Raghava Rao for Complainant.

N.S.

The Chief Justice,
Odgers and Beasley, JJ.
12th March, 1929.

O.S.A. No. 26 of 1928

Presidency Towns Insolvency Act, Ss. 7 and 36 (Amended)—Insolvency Court—Jurisdiction to decide liability of garnishee—Discretion.

Where the Official Assignee applied to the Court for the issue of a summons to a garnishee of the insolvent, and the garnishee appeared and admitted a portion of the sum claimed, but denied his liability with regard to the rest, and the Court ordered the garnishee to pay the admitted sum into Court, leaving the Official Assignee to institute a separate suit in respect of the portion of the debt denied by the garnishee,

Held, that it was in the discretion of the Insolvency Court to decide or not the liability of the garnishee, that no hard and fast rule can be laid down and that each case must be considered with respect to the circumstances arising in it.

Held, further, that it not having been shown that the discretion was not properly exercised, the decision should not be interfered with in appeal.

Nugent Grant instructed by *V. Varadaraja Mudaliar* for Appellant.

R. N. Aingar for Respondent.

P.R.N.

The Chief Justice, Wallace
and Anantakrishna Aiyar, JJ.
12th March, 1929.

O.S.A. No. 92 of 1927.

Civil Procedure Code, O. 21, R. 50 and O. 30, Rr. 3 and 4—Partnership—Suit and decree against firm in the name of the firm—Partner dying prior to suit—Separate estate of—Liability to be proceeded against in execution.

A decree against a firm in the name of the firm as such cannot be executed against the separate property of a partner who was dead at the time of the institution of the suit in which such decree was passed.

P. Viswanatha Aiyar for Appellant.

G. Krishnaswami Aiyar and *T. R. Sreenivas Aiyar* for Respondent.

P.R.N.

The Chief Justice, Wallace and Anantakrishna Aiyar, JJ.
15th March, 1929.

C.R.P. No. 633 of 1928

District Municipalities Act, S. 51—*Applicability—Election of person disqualified under S.* 49 (2)—*Remedy of aggrieved person.*

S. 51 of the District Municipalities Act only applies to cases where the election has become complete and a voter is not prevented from questioning or objecting to the election of a person disqualified under S. 49 (2) at the time of the nomination on the ground that he was so disqualified.

T. M. Krishnaswami Aiyar and *T. E. Ramabadhrachariar* for Petitioner.

K. Bhashyam Aiyangar and *V. C. Veeraraghavan* for Respondent.

P.R.N.

The Chief Justice and Anantakrishna Aiyar, J. O.S.A. No. 24 of 1928.
15th March, 1929.

Contract Act, S. 23—Agreement to pay money in return for offering puja to God for success in the suit—If opposed to public policy.

An agreement executed by a person promising to pay a certain amount in consideration of the other person offering puja to God and praying for the success of the executant in a suit filed by him is not illegal or opposed to public policy.

49 All. 705 distinguished.

R. Swaminatha Aiyar for Appellant.

K. Narasimha Aiyar for Respondent.

N.S.

The Chief Justice and Anantakrishna Aiyar, J. O.S.A. No. 82 of 1927.
15th March, 1929.

Trust—Trustee utilising trust moneys in his own private business—Right of beneficiary to claim a charge in respect of those moneys.

Where one of several trustees utilised the money belonging to the trust in his own business and was subsequently adjudicated an insolvent,

Held, that the other trustees were entitled to priority over other creditors of the insolvent in respect of the trust amount and would be entitled to a charge over the assets of the insolvent.

Principles of following the trust property discussed.

S. Duraswami Aiyar instructed by *V. Varadaraja Mudaliar* for Appellant.

Satagopa Mudaliar for Respondent.

V. V. Srinivasa Aiyangar, N. Rajagopala Aiyangar and *S. G.*

N.S.

Phillips and Reilly, JJ. A.S. No. 148 of 1926.
18th March, 1929.

Religious Endowment—Temple—Land taken by the trustee on permanent cowle—Alienation—Absence of necessity—Validity of the alienation.

Where certain sites were acquired by the trustees of a temple on permanent cowle for purposes connected with the temple and for building houses and subsequently the land was sold at a very high price,

Held, that the sites could not be said to have been dedicated to the trust in the sense that the property was given to the temple

for its maintenance or upkeep and that, though there was no necessity for the alienation, still, having regard to the terms of the original acquisition and the high price realised by the sale, the alienation must be upheld.

The Advocate-General and *M. Venkatasubbiah* for Appellant.

S. Varadachariar and *K. S. Venkatarama Aiyar* for Respondent.

N.S.

Wallace, J. C.M.S.A. No. 39 of 1925.

20th March, 1929.

Civil Procedure Code, S. 47 and O. 21, R. 2—Mortgage suit—Preliminary decree against two out of five defendants only—Satisfaction of decree entered on application of the other three defendants—Prior attachment of decree by another person—Application by the three defendants under O. 21, R. 2 to stop execution—Maintainability.

A preliminary decree was passed in a mortgage suit against two only out of five defendants. Subsequently the other three defendants alleging satisfaction of the decree applied to the Court to have it recorded and the same was done. Prior to this, the mortgage decree was attached by a person who had obtained a decree against the decree-holder and at his instance the record of satisfaction was set aside. Thereupon, the attaching decree-holder obtained a final decree and sought to execute it. The defendants who had previously applied for recording satisfaction put in an application alleging that the decree had been satisfied and execution ought not to issue.

Held, that the particular defendants who had put in the application could not be said to be the judgment-debtors as the decree directed payment of the money only by the other defendants, and, consequently, they had no *locus standi* to put in application under O. 21, R. 2, Civil Procedure Code; but, as they were parties to the suit and had not been exonerated, and as the attaching decree-holder was the representative of the original decree-holder and as the question whether the decree passed in the suit was executable or not was one relating to the execution of the decree, the question of the alleged satisfaction of the decree must be decided by the executing Court.

B. Jagannada Doss for Appellant.

D. Ramaswami Aiyangar for *H. Suryanarayana* for Respondents.

N.S.

Waller and Krishna Pandalai, JJ. C.C.C.A. No. 5 of 1927.
18*th March*, 1929.

Contract Act, S. 178*—Possession—Distinction from custody—Possession of canvasser for sale of goods—Pledge by such person—Validity.*

A person who acts only as a canvasser for the sale of a jewel has only custody of the jewel and not "possession" as defined in S. 178 of the Contract Act and consequently a pledge of the jewel by him is invalid and does not enable the pledgee to get a good title.

K. S. Krishnaswami Aiyangar and *V. Radhakrishnayya* for Appellant.

K. Bhashyam Aiyangar for *S. S. Sankara Mudaliar* for Respondent.

N.S.

The Chief Justice, Beasley and Waller, JJ. C.M.A. No. 369 of 1928.
25*th March*, 1929.

Workmen's Compensation Act, S. 2 (1) (*n*) *and Sch. II, cl.* (*v*)*—Construction—Workman employed in loading ship—Meaning—Cooly employed in carrying goods from warehouse to quay—Right of to compensation.*

Where a cooly who was employed to carry goods from a warehouse within the harbour about a quarter of mile distant from the quay, to the ship for loading was injured at the godown and the Commissioner of Labour awarded him compensation:

Held, that the cooly was not a workman within the meaning of S. 2 (1) (*n*) and Sch. II, cl. (*v*) of the Workmen's Compensation Act, and that he was not entitled to any compensation under the Act for injuries received in the course of his employment, as the Act requires that the warehouse or godown from which the goods are taken must be one by the side of the ship from which the goods must be directly loaded on to the ship.

Nugent Grant instructed by *King & Partridge* for Appellants.

K. V. Krishnaswami Aiyar and *K. V. Sesha Aiyangar* for Respondent.

P.R.N.

The Chief Justice, Odgers and Wallace, JJ. O.P. No. 115 of 1928.
26*th March*, 1929.

Income-tax Act, S. 4 (1)*—Construction—"Received in British India"—Meaning of—Foreign Railway Company for construction of railway line in French India—Line constructed and managed by Railway Company working in British India and pay-*

ment of profits in British India—Amount paid to foreign Company—Assessability to income-tax.

A Railway Company, to wit the Pondicherry Railway Company, incorporated in England was formed for the purpose of constructing a railway in Pondicherry, French India. The construction, management and running of the line was entrusted to the South Indian Railway Company having its office in British India and under the terms of the agreement, the latter Company was given absolute control, the latter Company's officers were to be officers of the foreign Company and the earnings were to be paid at the office in British India.

On a question arising as to the assessability of such earnings paid to the Pondicherry Railway Company:

Held, by Odgers and Beasley, JJ. (The Chief Justice dissenting), that, though the earnings paid to the foreign Company were in respect of operations outside British India, there was a receipt of the profits in British India, and that they are assessable to income-tax under S. 4 (1) of the Income-tax Act.

The Advocate-General instructed by *King & Partridge* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

P.R.N.

Kumaraswami Sastri, O.P. Nos. 127 and 217 of 1928.
Odgers and Wallace, JJ.
26th March, 1929.

Indian Income-tax Act, Ss. 4 (2) *and* 26*—Applicability—Business of joint Hindu family carried outside British India—Allotment at partition to one member—Receipt of profits in British India prior to and after partition—Assessability to income-tax.*

Held, that S. 26 of the Indian Income-tax Act governs the case of a Hindu co-parcener getting a business allotted to him at partition. Where the entire business of the joint family outside British India was given to the assessee at partition and the assessee conducted the same without closing the old account and starting new accounts, the profits made by the family were profits in the hands of the assessee; but that the liability was confined to the profits received by the family or assessee after partition.

K. S. Krishnaswami Aiyangar and *P. R. Srinivasa Aiyangar* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

P.R.N.

Odgers and Wallace, JJ. App. No. 349 of 1924.
26th March, 1929.

Civil Procedure Code, S. 13 (*b*)*—Suit on a mortgage in a foreign Court—Service of defendant by substituted service—Affi-*

davit by plaintiff giving details of his claim—Non-appearance of the defendant—Decree in favour of the plaintiff—If can be said to be given on the merits of the case.

A suit was filed on a mortgage bond in the District Court of Colombo and the defendant was served by substituted service. The plaintiff filed an affidavit detailing his claim and, the defendant not appearing, a decree was passed in favour of the plaintiff. The plaintiff instituted a suit on this foreign judgment.

Held, that the judgment of the foreign Court was not one given on the merits of the case within the meaning of S. 13, cl. (*b*) of the Civil Procedure Code.

Case-law reviewed.

T. M. Ramaswami Aiyar for Appellant.

V. Rajagopala Aiyar, S. Jagadisa Aiyar and *T. V. Ramiah* for Respondent.

N.S.

Phillips and Reilly, JJ. A. S. No. 248 of 1924.
28th March, 1929.

Partnership—Promissory note executed by one of the partners—Suit on—Liability of the other partners—Decree if can be given on the original cause of action.

Where a promissory note was executed by a person who was one of several partners in the partnership and there was no mention of the partnership in the promissory note nor was the executant mentioned in the note as representing the other partners,

Held, that the other partners could not be made liable on the promissory note, although the amount borrowed under the note was utilised for the purpose of the partnership business.

Held also, that a party will not be entitled to sue on the original cause of action in such a case unless the plaint is framed alternatively.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

S. Varadachariar for Respondent.

N.S.

Phillips and Reilly, JJ. App. No. 395 of 1924.
4th April, 1929.

Hindu Law—Minor co-parcener—Manager entering into partnership with another—Minor if entitled to the benefits of the partnership—Minor when can be said to be admitted to the benefits of the partnership.

A Hindu joint family *qua* joint family cannot be treated as a member in a partnership business. Consequently where a Hindu father entered into a partnership with a stranger he alone must be

deemed to be the partner and not the minor members of the joint family.

A minor member of the joint family cannot be deemed to have been admitted to the benefits of the partnership for the purpose of making him a partner unless some authorised person acting on behalf of the minor consented to the same.

C. S. Venkatachariar and *S. Venkatesa Aiyangar* for Appellant.

The Advocate-General and *M. Patanjali Sastri* for Respondents.

N.S.

Wallace and Walsh, JJ. C.M.A. No. 459 of 1928.
5th April, 1929.

Civil Procedure Code, O. 39, R. 4—Order of injunction—Varying of—Grounds for.

Under O. 39, R. 4 of the Civil Procedure Code an original order of injunction passed by a Court is not capable of being varied or modified without any fresh material or ground being disclosed. Consequently the varying of such an order on the ground that the petitioner had sufficient cause for not appearing at the time of the original hearing is not justifiable.

B. Jagannadhadoss for Appellant.

G. Lakshmanna and *G. Chandrasekara Sastri* for Respondent.

N.S.

Kumaraswami Sastri and Reilly, JJ. C.M.P. Nos. 649 and 650 of 1929.
5th April, 1929.

Civil Procedure Code, O. 45, R. 4—Consolidation of appeals—Grounds for—Discretion of Court.

Under O. 45, R. 4 of the Civil Procedure Code the question of consolidation of appeals is a matter of discretion to be exercised by the Court; the word "may" in the rule does not mean "shall."

Their Lordships declined to consolidate several rent suits filed by a Zamindar against the tenants for the purpose of enabling the Zamindar to file an appeal to the Privy Council on the ground that it would be a great hardship on the tenants to compel them to appear before the Privy Council.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Petitioner.

T. M. Krishnaswami Aiyar and *K. R. Venkatarama Sarma* for Respondents.

N.S.

Phillips and Madhavan Nair, JJ. A.S. No. 176 of 1927.
3rd April, 1929.

Mortgage—Suit on—Decree—Execution—Sale—Purchase by decree-holder—Sale by decree-holder purchaser to a stranger—Purchase benami for the mortgagor—Right of puisne mortgagee.

The first mortgagee obtained a decree on his mortgage and purchased the mortgaged properties in execution of his decree. A stranger purchased these properties from him *benami* for the mortgagor. The mortgagor filed a suit for recovery of these properties from the stranger and it ended in a compromise by which the stranger was to reconvey the properties to the mortgagor on payment of certain amount. As the mortgagor had no money, he borrowed this amount from another person and the property after it was got back by the mortgagor was conveyed to this person. The puisne mortgagee instituted a suit on his mortgage and impleaded the mortgagor and his assignee as defendants.

Held, that the mortgagor having purchased the mortgaged properties, though not directly in the execution proceedings, the prior mortgage cannot be said to have been intended to be kept alive and the properties were liable to the claim of the puisne mortgagee, and that the mortgagor's assignee was not entitled to priority in respect of the amount advanced by him as the same was not advanced for the purpose of discharging any prior obligation on the properties.

C. S. Venkatachariar and *K. R. Rangaswami Aiyangar* for Appellant.

S. Varadachariar, T. M. Ramaswami Aiyar and *R. Krishnaswami Aiyangar* for Respondents.

N.S.

Wallace and Walsh, JJ. C.M.A. No. 516 of 1928.
5th April, 1929.

Civil Procedure Code, O. 21, R. 2; O. 23, R. 3 and O. 34, R. 5—Preliminary decree in a mortgage suit—Application for final decree—Absence of notice to judgment-debtor—Final decree if void—Private adjustment after preliminary decree—Validity of.

There is nothing in the Civil Procedure Code which requires the giving of notice to the judgment-debtor at the time an application for a final decree is made and consequently the failure to give such a notice does not make the final decree *ipso facto* illegal.

An adjustment out of Court subsequent to the preliminary decree in a mortgage suit cannot be recognised by the Court; O. 21, R. 2 of the Civil Procedure Code does not apply, as an application for a final decree is not one in execution. O. 23, R. 3 of the Civil Procedure Code cannot be invoked to apply to an adjustment after the passing of a decree in the suit.

K. V. Sesha Aiyangar for Appellant.

P. R. Ganapathi Aiyar and *K. P. Panchapakesa Aiyar* for Respondents.

N.S.

N R C

Walsh, J. C.R.P. No. 1506 of 1927.
8*th April,* 1929.

Civil Procedure Code, S. 115—*Election of President for District Board—Petition for setting aside election—Dismissal of—Revision—Madras Local Boards Act, Ss.* 14 *and* 15, *cl.* (2)—*Eligibility of outgoing President for election.*

The High Court will not interfere in revision against an order of the Lower Court holding than an outgoing President of the District Board is eligible for re-election, even if the order is based on a misconstruction of the sections of the Local Board, as no question of jurisdiction is involved.

47 Mad. 869 and (1927) M.W.N. 842 referred to.

Obiter: An outgoing President of the District Board is eligible for re-election.

T. V. Muthukrishna Aiyar, N. Muthusami Aiyar and *V. C. Viraraghavachariar* for Petitioner.

P. Venkataramana Rao for Respondent.

N.S.

The Chief Justice and Walsh, J. L.P.A. No. 176 of 1926.
12*th April,* 1929.

Trust—Office of dharmakarthaship—Acquisition by prescription.

A dharmakarthaship of a temple can be established by prescriptive possession for over 12 years.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Appellant.

V. S. Govindachariar for Respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 394 of 1924.
15*th April,* 1929.

Evidence Act, S. 92 (4)—*Scope of—Suit on mortgage—Plea of payment of less amount and acceptance of same by the mortgagee—Admissibility of evidence.*

Though an unregistered agreement between the mortgagee and the mortgagor agreeing to receive a smaller amount than that due under the mortgage may not be admissible in evidence, the fact of payment of the smaller amount by the mortgagor to the mortgagee and acceptance of the same by the mortgagee in full discharge of the mortgage can be proved.

44 B. 55 not followed.

Case-law on the subject discussed.

K. V. Krishnaswami Aiyar for Appellant.

T. R. Venkatarama Sastri for Respondent.

N.S.

The Chief Justice and Walsh, J. L.P.A. No. 262 of 1925.
3rd April, 1929.

Hindu Law—Promissory note by father—Prior suit by son against father—Compromise decree for partition—Suit on promissory note against father—Decree—If creditor can proceed against son's share.

A promissory note was executed by a father to a creditor when a suit between the son and the father was pending regarding some disputes. The suit ended in a compromise decree effecting a partition between the parties. Subsequently the creditor filed a suit on the promissory note and obtained a decree against the father alone and attached and purchased in Court auction the son's share also.

In a suit by the sons to set aside the sale of their shares on the ground the creditor could not proceed against their shares,

Held that, although the decree was only against the father, still as the promissory note must be deemed to have been executed before a partition was effected, the debt was binding on the sons also and the creditor had a right to proceed in execution against the son's share also.

50 M. 535 (F.B.) and 51 M. 361 (F.B.) followed.

K.P. Ramakrishna Aiyar for Appellant.

K. S. Krishnaswami Aiyangar and *C. Narasimhachariar* for Respondent.

N.S.

The Chief Justice and Walsh, J. Cr.R.C. No. 921 of 1928.
8th April, 1929.

Penal Code, Ss. 116 *and* 161—*Offer of a bribe to a Police Officer when he is* functus officio—*If amounts to abetment of bribery under section* 161.

Where the accused had applied to be taken into the Police service, but his application was finally rejected by the Reserve Inspector and the District Superintendent and thereafter he offered a bribe to the Inspector to reconsider the decision,

Held that, the officer having become *functus officio,* there was no longer any bribe offered to do anything in the discharge of public duty and there was therefore no offence committed under Ss. 116 and 161, Indian Penal Code.

47 M.L.J. 662 and 21 C.W.N. 552 referred to.

K. P. Ramakrishna Aiyar for Petitioner.

Venkataraghavachari for The Public Prosecutor.

N.S.

N R C

The Chief Justice, Wallace and Anantakrishna Aiyar, JJ. O.S.A. No. 38 of 1926.
9th April, 1929.

Hindu Law—Partition—Share allotted to a member of a branch at a prior separation of member—Subsequent general partition—Mode of division—Share allotted to separating member, if to be deducted from share of his branch.

The share allotted to a separating member of a joint Hindu family, the other members remaining joint, must be deducted from the share to be allotted to the remaining members of that particular branch to which he belonged, at a subsequent general partition of joint family property. Principles discussed. 5 M. 362 followed.

K. S. Krishnaswami Aiyangar for Appellant.

V. V. Srinivasa Aiyangar and *T. L. Venkatarama Aiyar* for Respondents.

P.R.N.

Anantakrishna Aiyar, J. S.A. No. 1562 of 1925.
16th April, 1929.

Mortgage—Post diem *interest—Interest upon arrears of interest—When can be awarded.*

The material portion of a mortgage deed was as follows:—"As I have received this day Rs. 1,000 in cash for the marriage expenses of my son, I shall pay from this day for the above amount at three-fourth per cent. per mensem for the term of two years, the interest for each year to be paid in two instalments (தடவை) in the year on November 23rd and May 23rd. In case of failure to pay as above I shall pay interest on the above interest amount at one per cent. per mensem. On 23rd May, 1911, the end to the term, after deducting interest paid I shall pay the balance interest and the principal."

Held, that in a suit upon this mortgage, *post diem* interest was awardable as well as interest upon arrears of interest after the date of the period fixed in the document for the re-payment of the principal.

19 All. 39 (P.C.) followed.

35 All. 534 not followed.

T. Arumanatham Pillai for *P. S. Ramaswami Aiyangar* for Appellant.

N. Swaminathan for Respondent.

N.S.

Ramesam and Jackson, JJ. L.P.A. No. 118 of 1926.
18th April, 1929.

Madras District Municipalities Act, Ss. 82 (2), 345 *and Sch. IV, Rule* 15—*Assessment of property tax—Period within which it can be revised.*

The revision of the assessment of property tax need not necessarily be made within the year for which the tax is levied but can be made even afterwards at any time before three years after which no suit can be brought for the recovery of the amount under S. 345 of the District Municipalities Act.

K. Bhashyam Aiyangar for Appellant.

R. N. Aingar instructed by *King and Partridge* for Respondent.

N.S.

Waller and Anantakrishna Aiyar, JJ. S.A. Nos. 348 to 381 of 1925.
22nd April, 1929.

Madras Estates Land Act, S. 26 (3)—*Landholder—Receiver.*

A Receiver appointed to manage the properties pending an appeal to the Privy Council against the decree of the High Court concerning those properties is a landholder of the properties within the meaning of S. 26, cl. (3) of the Madras Estates Land Act.

L. A. Govindaraghava Aiyar and *S. A. Seshadri* for Appellant.

S. Ramaswami Aiyar and *D. Kumaraswamiah* for Respondents.

N.S.

Kumaraswami Sastri, J. Application No. 802 of 1929.
23rd April, 1929. C.S. No. 420 of 1922, Mad. H.C.
C.S. No. 510 of 1926, Bom. H.C.

Civil Procedure Code—Foreign adjudication—Prior attachment in British Indian Court—Effect—Order 21, *Rule* 53—*Compromise pending attachment—Validity—Provincial Insolvency Act, S.* 53 *considered.*

Under a decree of the Bombay High Court a preliminary decree of the Madras High Court was attached. A compromise was sought to be entered into between the judgment-debtor of the Bombay High Court and his own judgment-debtors. Meanwhile judgment-debtors in the Bombay High Court were adjudicated in Secunderabad.

On the application of the Bombay attaching decree-holder,

Held, Definition of "Foreign Court" in S. 2, cl. (5) of Civil Procedure Code is for purposes of the Code only. 36 Cal. 233 at 236. Secunderabad Court is a foreign Court. 21 Cal. 177. Attachment in a British Indian Court continues and Official Receiver takes only subject to equities. 1910 A.C. 508.

Held also compromise not valid so long as attachment remains in force—Order 21, Rule 53, Civil Procedure Code.

Relevant authorities and enactments fully discussed.

S. Duraiswami Aiyar and *A. K. Ramachandra Aiyar* for Applicants.

V. V. Srinivasa Aiyangar and *V. Radhakrishnayya* for Respondents.

T. Ramachandra Rao for Official Receiver, Secunderabad

K.S.

Wallace, Beasley and Madhavan Nair, JJ. C.M.P. Nos. 5167 and 5168 of 1928.

24th April, 1929.

Madras Land Revenue Assessment Act (1876), *Ss.* 6 *and* 7—*Applications for registration by rival claimants—Order of Collector referring parties to Civil Court—Board of Revenue setting order aside on Appeal—Legality—Application to High Court for writ of certiorari—Maintainability.*

Where rival claimants applied to the Collector for registration under the Madras Land Revenue Assessment Act (1876), but the Collector, without holding an enquiry at all, referred them to the Civil Court, and on appeal to the Board of Revenue, the Board set that order of the Collector aside, as being null and void, and directed him to hold an enquiry, and the petitioner filed an application in the High Court for a writ of certiorari to restrain the Collector from proceeding with the enquiry,

Held, that the order of the Collector referring the parties to the Civil Court was not one "refusing to register" within the meaning of S. 6 of the Madras Land Revenue Assessment Act, but amounted to a failure to exercise a jurisdiction vested in him by the Act, and was as such null and void, and that the enquiry ordered by the Board of Revenue in appeal should proceed and that the application for a writ of certiorari should be dismissed.

Sir C. P. Ramaswami Aiyar and *K. P. Ramakrishna Aiyar* for Petitioners.

V. V. Srinivasa Aiyangar and *K. S. Desikan* for Respondent.

The Government Pleader for the Government.

P.R.N.

Waller and Anantakrishna Aiyar, JJ. Cr.R.C. No. 941 of 1928.

29th April, 1929.

Criminal Procedure Code, S. 256—*Person asked to furnish security for his behaviour—If can avail himself of the provisions of the section.*

The following question was referred to a Full Bench: "Whether a person called upon to furnish security for good behaviour is entitled to the benefit of the provisions of S. 256 of the Criminal Procedure Code."

Nugent Grant and *R. Kesava Aiyangar* for Petitioner.

N. S. Mani for The Public Prosecutor.

N.S.

Waller and Anantakrishna Aiyar, JJ. L.P.A. No. 38 of 1929.
30th April, 1929.

Letters Patent (Madras), cl. 15—*Second Appeal—Decree—Order of refusal of Judge to give leave to appeal—Appeal—Maintainability.*

No appeal lies under cl. 15 of the Letters Patent against an order of a single Judge of the High Court refusing to grant leave to appeal against his judgment in a second appeal.

Ch. Raghava Rao for Appellant.

P. Venkataramana Rao, A. Lakshmayya and *D. Krishnaswami* for Respondents.

N.S.

Krishna Pandalai, J. S.A. No. 1277 of 1926.
30th April, 1929.

Contract—Agreement to execute melcharth and create kanom—Part of the amount paid—Suit for specific performance by person in whose favour the melcharth was executed—Maintainability.

Where a landlord agreed to execute a melcharth in favour of another and create a kanom of Rs. 1,000 over his properties and in pursuance of this agreement received Rs. 450 and, subsequently, the person in whose favour the melcharth was executed brought a suit for specific performance of this agreement offering to pay the balance due,

Held, that the suit was really one to enforce a contract to grant a kanom lease and not one to enforce a contract to lend money and consequently was maintainable.

K. P. Ramakrishna Aiyar for Appellant.

K. Kuttikrishna Menon and *A. Parameswara Aiyar* for Respondents.

N.S.

Wallace, Beasley and Madhavan Nair, JJ. C.R.P. No. 234 of 1926.
1st May, 1929.

Civil Procedure Code, O. 21, *R.* 100—*Application under—Dismissal for default—Restoration—Power of Court—O.* 9, *R.* 9—*Applicability.*

Held, that Order 9, Rule 9 does not apply to execution proceedings except when the order in such proceedings amounts to a decree and falls under S. 47 of the Civil Procedure Code; and consequently a Court has no power to restore an application under Rule 100 of Order 21, which has been dismissed for default, as such an application is one in execution.

Held further, that the Court had no inherent power to restore the same.

P. R. Srinivasan and *P. N. Appusami Aiyar* for Petitioner.

S. Krishnaswami Aiyar (Court guardian) for Respondents.

P.R.N.

The Chief Justice, O.P. No. 115 of 1928.
Odgers and Beasley, JJ.
1st May, 1929.

Income-tax Act, S. 10 (2) (*ix*)—*Foreign Railway Company—Payment of share of profits to Colonial Government under agreement—If can be deducted for the purpose of computing profits for income-tax.*

A foreign Railway Company had to pay half the profits to the Colonial Government in consideration of the permission granted to the Company for constructing the railway line under an agreement entered into between the Government and the Company. On a question arising as whether such profits paid should be deducted in computing profits:

Held, that the amount paid was not expenditure incurred before ascertainment of profits, but was only a payment out of the profits and hence could not be deducted under section 10 (2) of the Income-tax Act, in computing profits for purposes of income-tax.

A. Krishnaswami Aiyar (*Advocate-General*) instructed by *King and Partridge* for Assessee.

M Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Jackson, J. C.M.S.A. No. 199 of 1927.
2nd May, 1929.

Civil Procedure Code, O. 21, *R.* 2—*Uncertified payment—Jurisdiction of executing Court.*

Where a decree-holder stated in his execution application that a certain amount had been paid by the judgment-debtor to the decree-holder, but the same had been appropriated by the decree-holder for some other claim,

Held, that the executing Court could have jurisdiction to enquire into the fact of his uncertified payment as the payment was brought to the notice of the Court by the decree-holder himself and not the judgment-debtor.

A. C. Sampath Aiyangar for Appellant.

S. Varadachariar and *N. C. Vijayaraghavachariar* for Respondents.

N.S.

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